

90-712

FILED

OCT 26 1990

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CLERK

IN THE
Supreme Court Of The United States
October Term, 1990

ED PETER MACK and NATHANIEL GOSHA, III,
individually and on behalf of others similarly situated,
Appellants,

vs.

RUSSELL COUNTY COMMISSION and
ETOWAH COUNTY COMMISSION,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

JURISDICTIONAL STATEMENT

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October 1990



QUESTIONS PRESENTED

1. In an action to enjoin enforcement of a State law which has not been submitted for preclearance under Section 5 of the Voting Rights Act, may the local three-judge district court, exercising its limited jurisdiction, refuse to enjoin the State law on the ground that, even though intervening changes reveal a clear potential for discrimination today, it would have had no potential for discrimination under the conditions existing when the unprecleared law was enacted?
2. Must a county government or State submit for preclearance, under Section 5 of the Voting Rights Act, a State law which transfers powers from an elected county official to an appointed county official?

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Appellants,

vs.

RUSSELL COUNTY COMMISSION and
ETOWAH COUNTY COMMISSION,

Appellees.

PARTIES IN COURT BELOW

The parties in the court below at the time of the judgment were plaintiffs Ed Peter Mack, Nathaniel Gosha, III, Lawrence C. Presley, and defendants Russell County Commission and Etowah County Commission. This appeal relates only to the claim of Mack and Gosha against the Russell County Commission. Lawrence C. Presley, a resident of Etowah County, has informed the Clerk that he has no interest in this appeal.

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OPINIONS BELOW

The opinion of the District Court is unreported. The opinion of the District Court is reproduced beginning at A-1; the order denying the motion to alter or amend the judgment is reproduced beginning at A-42.

JURISDICTION

The District Court denied the requested injunction on 1 August 1990 and denied the motion to alter or amend the judgment on 21 August 1990. This appeal is taken under 28 USC §1253.

STATUTORY PROVISIONS

Alabama Act 79-652 is reproduced beginning at A-48. Section 5 of the Voting Rights Act of 1965 (42 USC § 1973c) is reproduced beginning at A-45.

STATEMENT OF THE CASE

Alabama Act 79-652 transferred from the Russell County Commissioners to the Russell County Engineer all functions, duties, and responsibilities for roads, highways, bridges, and ferries — this centralized control is called “the unit system” in Alabama. Prior to that, each commissioner had controlled the road work in his own district.

Despite its transfer of important governmental functions from the supervision and control of elected county commissioners to the (appointed) county engineer, neither the County Commission nor any State official made any attempt to submit Act 79-652 for preclearance until the Department of Justice made a written request in 1989 that it be submitted. When the County refused to do so, the plaintiffs brought this action.

At the time the 1979 act was adopted, the Russell County Commission consisted of five commissioners elected at large from four residency subdistricts; three rural districts had one commissioner each and Phenix City (the largest city in the county) had two seats on the commission. The commissioners residing in the rural

districts exercised exclusive discretion and control over the road shops, road equipment, materials, expenditures and employees in their respective districts. Each commissioner was responsible for maintaining a county workshop and for maintaining a road crew. Prior to converting to the unit system, each "commissioner had a road crew that he was in charge of and that he — even though he had a foreman, you know, he made the assignments and pretty generally called the shots on what work was done and where and so forth."¹ Each commissioner also made decisions about hiring, firing, and assignment of personnel in his road shop. This amounted to substantial employment authority, because the road and bridge system is a major employer in Russell County government. Road and bridge expenditures represent the vast majority of the county's budget and of public monies over which the county government exercises discretionary authority. The budget of the county engineer is \$1.8 million. Prior to implementation of Act 79-652, appropriations from the budget were made on the basis of road and bridge districts.

In May 1979, the Russell County Commission adopted a resolution which placed all county road construction, maintenance, personnel and inventory under the supervision of the County Engineer and requested the Russell County legislative delegation to enact this change as law. In July 1979 the Alabama State Legislature passed Act 79-652, which converted the process for governing the road and bridge budget and operations to a "unit system." The Act provides:

All functions, duties and responsibilities for the construction, maintenance and repair of public roads, highways, bridges and ferries in Russell County are hereby vested in the county engineer, who shall, insofar as possible, construct and maintain such roads, highways, bridges and ferries on the basis of the county as a whole or as a unit, without regard to district or beat lines.

¹ Adams depo. at 11. Former Representative Charles Adams was the primary sponsor of Act 79-652.

The conversion to a unit system was a fundamental alteration in the governing process of the county commission's road and bridge system. The change was so far-reaching that the unit system has been implemented gradually over a period of time — despite the mandate of Act 79-652. Conversion to the unit system also required restructuring some of the road shops.

The Russell County Commission is now composed of seven commissioners elected from single-member districts, pursuant to an order entered 17 March 1985, in *Sumbry v Russell County*, CA No. 84-T-1386-E (MD Ala). That order approved a consent decree providing for elections from single-member districts beginning in 1986 and was designed to remedy unlawful dilution of black voting strength caused by the prior at-large election system. Nathaniel Gosha, III, and Ed Peter Mack, the first black county commissioners in Russell County, were elected in 1986 from Districts 4 and 5, respectively, each of which has a black voter majority.

Commissioners Mack and Gosha (appellants in this Court) petitioned the District Court for an injunction to restrain appellee Russell County Commission from implementing Act 79-652, until and unless the statute receives preclearance under Section 5 of the Voting Rights Act, 42 USC § 1973c.² The District Court ruled that Act 79-652 did not have to be submitted for preclearance. The appellants filed a timely appeal.

² Mack, Gosha, William America (Escambia County commissioner) and Lawrence Presley (Etowah County commissioner) first brought suit under Section 2 of the Voting Rights Act and Title VI of the Civil Rights Act of 1964 about similar discriminatory practices that reduced the effectiveness of the commissioners elected by blacks in each of the counties. Mack and Gosha claimed that the county unit plan was being administered in a discriminatory way. Later, when they discovered that the county unit plan had not been submitted for preclearance, they amended their complaint to ask for relief under Section 5. Their other claims are still pending in the District Court. This appeal relates only to the Section 5 claim of Mack and Gosha against Russell County.

THE QUESTIONS ARE SUBSTANTIAL

Just as the voting power of the black electorate is submerged when at-large elections are used where there is racially polarized voting, the change from a district road system to a unit system may dilute the power of officials elected by blacks. In an at-large election, blacks may be unable to elect representatives of their choice; if the county adopts single-member districts for elections and a unit system for road work, black voters may be unable to have their elected representatives carry out the policies desired by the black electorate. This case raises the important question whether the change to a unit system must be submitted for preclearance under Section 5 of the Voting Rights Act.

Section 5 of the Voting Rights Act of 1965, as amended, 42 USC § 1973c, requires a State or political subdivision covered by the Act to withhold implementation of any change in its standards, practices, or procedures with respect to voting until it obtains from the Attorney General of the United States or the District Court for the District of Columbia a determination that the proposed change has neither the purpose nor the effect of denying or abridging the right to vote on account of race. "The legislative history [of Section 5] on the whole supports the view that Congress intended to reach any state enactment which altered the election law of a covered State in even a minor way." *Allen v State Board of Elections*, 393 US 533, 566 (1969).

- I. **The District Court decision is in conflict with decisions of this Court and the regulations of the Department of Justice regarding the proper "benchmark" for comparison of an unprecleared change in election-related law.**

The District Court correctly stated the statutory rule

that in assessing the discriminatory or retrogressive effect of a change, the proper benchmark for comparison is the regime 'in effect at the time of the submission,' taking into account duly precleared changes which have occurred subsequent to the original statutory benchmark date.

...

We therefore measure the purported changes in this case against the benchmark of the 1964 regime as modified by any intervening duly precleared changes.

Order, A-14-15.

The standard stated by the District Court was the one used by this Court in *City of Rome v United States*, 446 US 156 (1980). Over a 10-year period Rome had failed to submit 60 annexations for preclearance. Upon submission, the Attorney General objected to 13 of the annexations. This Court held,

Because Rome's failure to preclear any of these annexations caused a delay in federal review and placed the annexations before the District Court as a group, the court was correct in concluding that the cumulative effect of the 13 annexations must be examined from the perspective of the most current available population data.

446 US at 186. The district court in *Rome* had used the current perspective because Section 5 "requires, in the future tense, that the plaintiff jurisdiction demonstrate that its voting changes 'will not' have a discriminatory effect," *City of Rome v United States*, 472 FSupp 221, 246 (D DC 1979) (3-judge court) (emphasis in original).³ The Department of Justice regulations governing Section 5 submissions have codified this standard. 28 CFR § 51.54(b) provides, in part, as follows:

(1) In determining whether a submitted change is retrogressive the Attorney General will normally compare the submitted change to the voting practice or procedure *in effect at the time of the submission*. If the existing practice or procedure was not in effect on the jurisdiction's applicable date for coverage . . . and is not otherwise legally enforceable under Section 5, it cannot

³This same prospective application has been applied in favor of a jurisdiction, as well. In *City of Richmond v United States*, 422 US 358, 373-375 (1975), this Court held that even if annexations were originally undertaken with an impermissible purpose, they could be approved under Section 5 if, at the time the annexations were being reviewed, there were sound non-discriminatory grounds to support them.

serve as a benchmark, and . . . the comparison shall be with the last legally enforceable practice or procedure used by the jurisdiction.

(2) The Attorney General will make the comparison based on the *conditions existing at the time of the submission*. (Emphasis supplied.)

Despite its citation of the correct standard, the District Court failed to follow the standard.

In 1964 the Russell County Commission had three members elected at large from residency districts; within each residency district the commissioner controlled road work. Order, A-2. In 1985 the commission was enlarged to seven members, elected from single-member districts; this change was precleared. Order, A-4. Thus, "the 1964 regime as modified by any intervening duly precleared changes" was seven single-member districts and each commissioner having control over road construction and maintenance in his district.

Rather than judging whether the change to a county unit system affects voting in the context of the 1985 precleared change to single-member districts, the District Court incorrectly judged the county unit system as if it affected only an at-large system. The District Court was deciding whether it would have required the county unit system to be submitted for preclearance in 1979 without regard for the events that have occurred since then. The District Court committed clear error by centering its attention only on the conditions immediately "before and after the 1979 change," A-21, when the county commission was still elected at large.

Since "the question [in a Section 5 injunction action] is not whether the provision is in fact innocuous and likely to be approved, but whether it has a *potential* for discrimination," *Dougherty County Board of Education v White*, 439 US 32, 42 (1978) (emphasis in original), the court must look at all evidence which might demonstrate a potential for discrimination. The law is "a fool and a ass" (to quote Mr. Macabre) if the court must blind itself to actual discrimination by pretending that it would not have seen the *potential* for that discrimination several years earlier.

II. The decision of the District Court is in conflict with this Court's holdings in *Allen v State Board of Elections*, 393 US 533 (1969), *McCain v Lybrand*, 465 US 236 (1984) and *Dougherty County Board of Education v White*, 439 US 32 (1978), which require that a State must preclear a transfer of responsibilities from elected to appointed officials.

A.

A unit system has the potential to dilute black voting strength. A switch from a district road system to a unit system changes the manner of sharing political power on the commission from one in which each member controlled a portion of the budget, which he or she could use to bargain with other commissioners for constituent services of all sorts, to a system that gave the white majority effective control over every decision concerning the road and bridge system.

As the dissent noted in *Rutan v Republican Party of Illinois*, ___ US ___, 111 LEd2d 52, 88 (1990),

Patronage, moreover, has been a powerful means of achieving the social and political integration of excluded groups. . . . The abolition of patronage, however, prevents groups that have only recently obtained political power, especially blacks, from following this path to economic and social advancement.

While this case is not about patronage, it is about a similar form of political power: the ability of commissioners to act with relative autonomy within their own districts so that they may provide services useful to their black constituents, but which may not be provided by a white-majority commission to black constituents. In the context of racially polarized voting (which was the basis of the *Sumbry* complaint), a change from the tradition of commissioner-to-commissioner "horse-trading" to majority-vote decision-making could operate to the unique disadvantage of the newly empowered black community.

B.

One of the three cases decided with *Allen* was *Bunton v Patterson*, in which the plaintiffs alleged that the State of Missis-

issippi had first to obtain approval under Section 5 of the Voting Rights Act before it could enforce a law requiring 11 counties to appoint, instead of elect, the county superintendent of education. *Allen*, 393 US at 550-551. This Court held, "an important county officer in certain counties was made appointive instead of elective. The power of a citizen's vote is affected by this amendment; after the change, he is prohibited from electing an officer formerly subject to the approval of the voters." *Allen*, 393 US at 569-570.

If the State of Alabama had changed the office of Russell County commissioner from elective to appointive, it would have had to obtain preclearance. A substantial question exists whether the State must obtain preclearance if it shifts powers to an appointive officer while continuing to elect the officer from whom the powers were taken — that is, when it use indirect means to accomplish the goal of removing voter control over the official exercising significant powers. In the present case, the voters continue to elect county commissioners, but a significant power formerly held by those commissioners has been shifted to the county engineer, over whom the voters have no direct control. The net result of the Russell County change is the same as in *Bunton* — less power for the voters over their local affairs.

In *McCain v Lybrand*, 465 US 236 (1984), this Court considered whether a change in county government from two appointed and one elected member to three elected members had to be submitted under Section 5 and held,

While this matter may be more fully explored in future proceedings after remand, several changes [covered by Section 5] are suggested: . . . the basic reallocation of authority from the state legislative delegation to the Council, [and] the shift from two appointed Board positions to at-large election of their Council counterparts. . . .

McCain, 465 US at 250 n.17. Surely, if a change from appointment to election must be precleared, a transfer of power from an elected to an appointed official must similarly be submitted for preclearance.

C.

The elimination of political powers previously exercised by elected commissioners might also have the potential of inhibiting black citizens from seeking or remaining in office. This Court, in *Dougherty County Board of Education v White*, 439 US 32 (1978), required preclearance of a board of education's rule requiring all employees seeking elective office to take a leave of absence without pay. Noting that the phrase "standard, practice, or procedure" found in Section 5 of the Voting Rights Act must be given the "broadest possible scope," the Court found that preclearance was required of "[a]ny alteration affecting the eligibility of persons to become or remain candidates or obtain a position on the ballot in primary or general elections *or to become or remain office-holders.*" *Dougherty*, 439 US at 39 (emphasis in original).

The Russell County legislation cannot be characterized as having only a minimal effect on the duties and responsibilities of the new black county commissioners. To the contrary, the road and bridge revenues constitute the vast majority of the public monies over which the commissioners exercise discretionary authority. The record is replete with statements attesting to the political influence that accompanies control over the road and bridge operations and budget. Without the power to influence the road and bridge budget, representatives of black voters are less able to respond to requests by constituents and to protect their interests.

III. The decision of the District Court in this case is in conflict with decisions of other three-judge district courts holding that a State must preclear a transfer of responsibilities from elected to appointed officials.

Preclearance has been required in a number of cases involving the transfer of governmental authority from officials elected by one constituency to officials elected by a different constituency or to appointed officials. In *Horry County v United States*, 449 FSupp 990 (D DC 1978), the court found that a South Carolina statute constituted a change in electoral practices requiring preclearance because it provided for electing public officials who formerly were appointed by the Governor.

An alternate reason for subjecting the new method of selecting the Horry County governing body to Section 5 preclearance is that the change involved reallocates governmental powers among elected officials voted upon by different constituencies. Such changes necessarily affect the voting rights of the citizens of Horry County, and must be subjected to Section 5 requirements. *Cf. Perkins v Matthews*, [400 US 382 (1971)]; *Allen v State Board of Elections*, *supra*.

449 FSupp at 995. *See also, County Council of Sumter County v United States*, 555 FSupp 694 (D DC 1983) (preclearance required of a law which eliminated the legal power of the governor and general assembly over local affairs and vested it exclusively in a county council elected at large by county voters).

Addressing a change which resembles that effected by Act 79-652, the *Horry County* court also held that the statute required preclearance because it changed the duties of the chairman of the county council. *Horry County* at 995. The chairman previously had authority to direct the construction and repair of all roads and bridges in the county and supervise the employees engaged in such work, subject to the approval of a majority of the Board. The new statute assigned the chairman no powers or authority different from those of the other council members. *Horry County* at 993-94. The new statute also gave the county council additional taxing, legislative and administrative duties which were not provided under the previous statute. *Horry County* at 994.

The duties of the chairman of the former Horry County Board of Commissioners and those of the chairman of the Horry County Council under Act R546 are sufficiently different that in this respect also Act R546 constitutes a change in electoral practices requiring preclearance under Section 5 of the Voting Rights Act — unlike the two at large council seats in *Beer v United States*, . . . 425 US [130] at 139 [(1976)], which underwent no change at all.

Horry County at 995-96.

In *Hardy v Wallace*, 603 FSupp 174 (ND Ala 1985), a three-judge court required preclearance of a statute that transferred

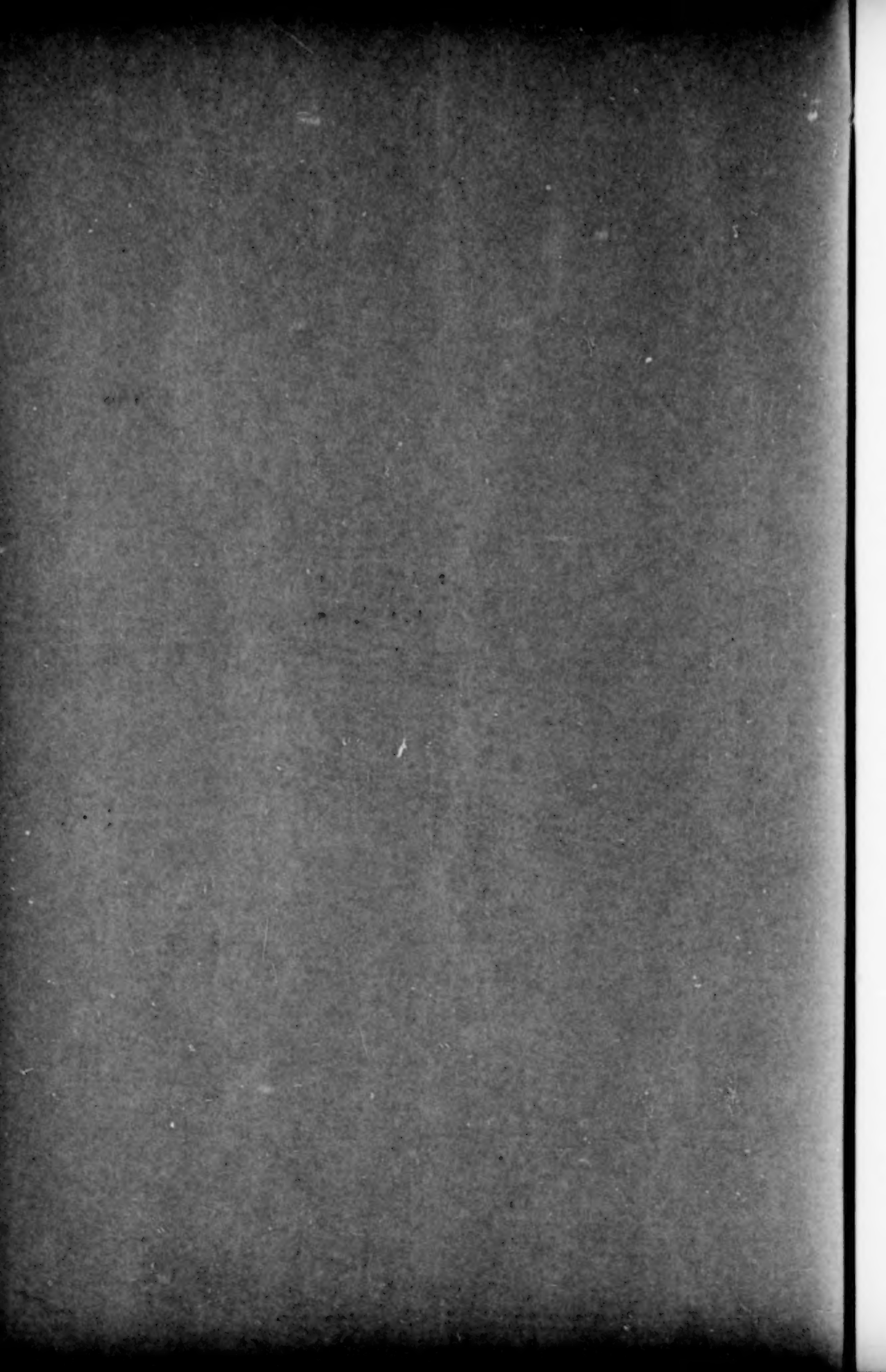
the power to appoint members of the Greene County Racing Commission from the Greene County legislative delegation to the State governor. Writing for the court, the late Judge Robert S. Vance noted that "the most relevant attribute of the challenged act is its effect on the power of the voters rather than any aspect of the electoral process." *Hardy* at 178. Similarly, the power of the voters in black-majority districts to choose a commissioner who will follow their wishes and have the power to do so is a relevant attribute of the pre-1979 situation in Russell County.

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October 1990



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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

| | | |
|-------------------------------|---|----------------|
| ED PETER MACK, |) | [Filed |
| NATHANIEL GOSHA, III, |) | Aug. 1, 1990] |
| and LAWRENCE C. PRESLEY, |) | |
| individually and on behalf |) | |
| of others similarly situated, |) | |
| |) | |
| Plaintiffs, |) | |
| |) | CIVIL ACTION |
| vs. |) | NO. 89-T-459-E |
| |) | |
| RUSSELL COUNTY COMMISSION |) | |
| and |) | |
| ETOWAH COUNTY COMMISSION, |) | |
| |) | |
| Defendants. |) | |

ORDER

Before JOHNSON, Circuit Judge, HOBBS, Chief District Judge,
and THOMPSON, District JUDGE.

JOHNSON, Circuit Judge:

This three-judge district court is convened pursuant to 28 U.S.C.A. § 2284 (West 1978 & Supp. 1990) to hear the plaintiffs' claims under section 5 of the Voting Rights Act of 1965, 42 U.S.C.A. § 1973c (West 1981) ("Section 5"). Plaintiffs Ed Peter Mack and Nathaniel Gosha III are the only black members of the Russell County Commission, representing single-member districts 4 and 5, two of the three districts in Russell County with black voting majorities. Plaintiff Lawrence C. Presley is the only black member of the Etowah County Commission, representing single-member district 5, the only district in Etowah County with a black voting majority. Each of the named plaintiffs represents a certified class consisting of the black voters in their respective districts. By order of this court entered on March 8, 1990, the United

States Department of Justice was requested to participate in this case, and it has filed a brief and presented argument as *amicus curiae* on behalf of the plaintiffs. The sole issues before this court are whether three changes in the local governance of Russell and Etowah Counties — one change effected by Russell County in 1979, and two changes effected by Etowah County in 1987 — constitute changes in a “standard, practice, or procedure with respect to voting” subject to preclearance under section 5.

I. FACTS

A. Russell County

On November 1, 1964, the Russell County Commission was composed of three commissioners elected at large from the entire county under a “residency district” system, whereby a candidate for any given seat is required to reside in the separate district associated with that seat, but is voted upon by the county-wide electorate. Pursuant to a 1972 federal court order, *see Anthony v. Russell County*, Civil Action No. 961-E (M.D. Ala. Nov. 21, 1972) (Varner, J.), the Commission was increased in size to five members, also elected under an at-large residency-district system. A fourth residency district consisting of Phenix City, the largest city in Russell County, was created and assigned two commissioners. While the record is somewhat unclear and is subject to some dispute between the parties, we find the facts relevant to our decision here to be reasonably clear and undisputed. Following the 1972 restructuring,¹ the three rural commissioners each maintained separate authority over three county “road shops,” each with its own road crew and equipment. The rural commissioners were separately responsible for managing and supervising road and bridge repair and construction, out of their respective road shops, within “road districts” essentially congruent with their respective residency districts.² The commissioners had indepen-

¹While the evidence is sparse as to the system prevailing prior to 1972, it appears that the district system had remained essentially unchanged since 1964.

²While it appears that Russell County has occasionally done some road work within Phenix City, the parties agree that municipal roads have traditionally been funded and maintained separately from county roads.

dent authority to set road-work priorities for their districts, buy equipment for their road shops, and hire, fire, and supervise personnel in their road crews. While the record is somewhat ambiguous as to the commissioners' autonomy in budgetary matters, it appears that at least routine repair and maintenance work and routine purchase orders were subject to approval by individual commissioners without a vote of the entire Commission.³ The county engineer under the foregoing "district system" was limited to providing engineering and surveying services to the separate road shops, and to running a county-wide asphalt crew responsible for fixing potholes.

On May 18, 1979, following an investigation into corruption in Russell County's road operations which led to the indictment of one commissioner, the Russell County Commission unanimously passed a resolution "to place all County road construction, maintenance, personnel and inventory under the supervision of the County Engineer effective immediately and to request the Russell County Legislative Delegation [to] pass the necessary legislation to implement this change." Although it appears that the Commission already possessed ample authority under state law to adopt this "unit system" for managing road work,⁴ Russell County's state representative sponsored the enactment, on July 30, 1979, of Act No. 79-652, 1979 Ala. Acts 1132, which ratified the May 18 resolution and provided, in principal part:

Section 1. All functions, duties and responsibilities for the construction, maintenance and repair of public roads, highways, bridges and ferries in Russell County are hereby vested in the county engineer, who shall, insofar as possible, construct and maintain such roads, highways, bridges and ferries on the basis of the county as a whole or as a unit, without regard to district or beat lines.

³It appears that funding for new construction and major repair projects was subject to vote by the entire Commission.

⁴Ala. Code § 23-1-80 provides that county commissioners shall "have general superintendence of the public roads, bridges and ferries within their respective counties," and Ala. Code § 11-6-3 provides that county engineers, "subject to the approval and direction of the county commission," shall have general supervisory authority over county roads and bridges.

Under the unit system, the separate road districts were abolished and all county road operations were placed under the direct authority of the county engineer, an official appointed by, and responsible to, the entire Commission. The county engineer has consolidated the road shops from three to two in number,⁵ and has substantially reduced and streamlined the road work force.

Pursuant to a 1985 consent decree, *see Sumbry v. Russell County*, Civil Action No. 84-T-1386-E (M.D. Ala. March 17, 1985), the Russell County Commission was enlarged to seven members elected from single-member districts rather than at large. This consent decree was duly precleared under Section 5 by the Department of Justice. Plaintiffs Mack and Gosha were elected in 1986 pursuant to this consent decree, becoming the first black county commissioners in Russell County in modern times.

B. Etowah County

On November 1, 1964, the Etowah County Commission was composed of five members, four elected at large from four residency districts, and a chairman elected at large with no residency requirement. Each of the four residency districts constituted a road district, and the commissioner from each residency district exercised complete supervision and control over the road shop, equipment, and road crew of that district. With regard to road operations, Etowah County thus appears to have operated under a district system essentially similar to that prevailing in Russell County prior to 1979. The record is unclear as to the precise allocation of budgetary authority under Etowah County's system, but it appears that road funds, after being initially divided up by vote of the entire Commission according to a projection of the needs of each district, were subject to the individual control and discretion of each commissioner regarding priorities *within* that commissioner's district. The chairman's responsibilities were limited to overseeing the solid waste authority, preparing the budget, and managing the courthouse building and grounds.

Pursuant to a 1986 consent decree, *see Dillard v. Crenshaw County*, Civil Action No. 85-T-1332-N (M.D. Ala. Nov. 12, 1986),

⁵Apparently, the third road shop is still in existence, but is now used only for storage.

the Etowah County Commission has been phasing in a new single-member-district structure. This consent decree was duly precleared under Section 5 by the Department of Justice in October 1986. Under the new structure, the Commission will have six members elected from single-member districts rather than at large. Two new commissioners were elected from single-member districts 5 and 6 in December 1986, joining the four incumbent members elected at large from the old residency districts. Beginning in January 1987, when the two new commissioners took office, the incumbent at-large chairman was deprived of his vote; he will serve out his term through January 1993, however, after which the chairmanship will be rotated among the six commissioners. One of the two commissioners elected in December 1986 is plaintiff Presley, the first and only black commissioner, from district 5; the other is Billy Ray Williams, who is white, from district 6. Elections for single-member districts 2 and 3 were held in 1988, and two of the four incumbent at-large members, Billy Ray McKee and Jesse Burns, successfully ran for those seats. The seats for single-member districts 1 and 4 will be filled by election in November 1990; thereafter, either two or four commissioners, will be elected every two years, to serve four-year terms. The current commissioners for district 1 and 4 are the other two members of the old Commission, M. Thomas Smith and W.A. Lutes. Thus, the voting membership of the Commission since January 1987 has consisted of the four "holdover" commissioners (two of whom have since been elected from single-member districts and two of whom face reelection or defeat this year from single-member districts), and the two new single-member-district commissioners elected in 1986, Presley and Williams.

The 1986 consent decree provided that the two new commissioners elected in 1986 "shall have all the rights, privileges, duties and immunities of the other commissioners, who have heretofore been elected at large." On August 25, 1987, however, the Commission passed a resolution ("the road supervision resolution"), over the "no" votes of Commissioners Presley and Williams, providing that each of the four holdover commissioners would continue to "oversee and supervise the road workers and the road operations assigned to the road shop" in their respective districts. The resolution further provided that the four holdovers "shall

jointly oversee, with input and advice of the County Engineer, the repair, maintenance and improvement of the streets, roads and public ways of all of Etowah County." The four holdovers thus retained complete day-to-day control over all county road operations, although they no longer represented the entire county, and although one of the road shops is now physically located within Presley's district. Presley's and Williams's districts, which are centered on the city of Gadsden,⁶ contain, respectively, 0.3% and 4% of the county road mileage in Etowah County; the other four districts contain between 16% and 30% each of the county road mileage. The resolution provided that Presley would oversee maintenance of the county courthouse and Williams the operation of the engineering department; Presley and Williams were to share supervision of the county farmers' market. There is no evidence that the four holdover commissioners gave up any of their supervisory authority over road operations between January 1987, when Presley and Williams took office, and the passage of the resolution. Thus, the August 1987 resolution appears to have simply ratified a *de facto* allocation of authority on the new six-member Commission which had existed since January 1987.

Also on August 25, 1987, the Etowah County Commission passed a resolution ("the common fund resolution") providing that

all monies earmarked and budgeted for repair, maintenance and improvement of the streets, roads and public ways of Etowah County [shall] be placed and maintained in common accounts, [and shall] not be allocated, budgeted or designated for use in districts, and [shall] be used county-wide in accordance with need, for the repair, maintenance and improvement of all streets, roads and public ways in Etowah County which are under the jurisdiction of the Etowah County Commission.⁷

⁶As in Russell County, it appears that municipal road work in Etowah County has traditionally been funded and carried out separately from that of the county.

⁷The resolution also provided that monies already budgeted separately by districts for 1986-87 should remain in those districts, and that any such funds left over at the end of the 1986-87 fiscal year should be carried over as district allocations for 1987-88.

This resolution was also passed over the "no" votes of Presley and Williams. The effect of the common fund resolution appears to have been to shift control over the allocation of road funds *within* each district from the respective individual commissioners to the Commission as a whole. The common fund resolution did not, however, work any change in the entire Commission's authority, as a body, to determine the initial allocation of funds *among* the various districts. To a large extent, the common fund resolution appears to have merely recast in form, without changing in substance, the manner in which the entire Commission sets budget priorities, from a system of designating funds on a district-by-district need basis to one of designating funds on a county-wide need basis without regard to district lines. Since 1987, the road budget for Etowah County has been passed each year by a 4-2 vote with Presley and Williams dissenting.

C. Procedural History

On May 5, 1989, the plaintiffs filed a complaint with the District Court for the Middle District of Alabama alleging racially discriminatory governance of road operations in Russell and Etowah Counties in violation of previous court orders, the Fourteenth and Fifteenth Amendments, Title VI of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000d (West 1981), and section 2 of the Voting Rights Act of 1965, 42 U.S.C.A. § 1973 (West 1981 & Supp. 1990).⁸ On December 22, 1989, the plaintiffs were granted leave to file an amended complaint in the district court reasserting the foregoing claims and adding the claim that Russell County had improperly failed to preclear under section 5 the 1979 change to the unit system of managing road operations. This court was designated to hear the section 5 claim against Russell County on December 26, 1989. On February 8, 1990, the plaintiffs filed a second amended complaint adding the claims that Etowah County had improperly failed to preclear under section 5 the 1987 road supervision and common fund resolutions. This court was designated to hear those claims on February 20,

⁸The original complaint also included claims against Escambia County, which were voluntarily dismissed on October 30, 1989.

1990. The district court's trial of the section 2 and related substantive claims against both Russell and Etowah Counties has been continued pending this court's disposition of the section 5 claims. On November 24, 1989, the Department of Justice requested that Russell County submit the 1979 change for preclearance, but Russell County declined. As noted above, the Department of Justice has participated in this case as *amicus curiae*, taking the position that all three disputed changes are subject to preclearance under section 5.

II. ANALYSIS

A. *Controlling Law*

Under section 5 of the Voting Rights Act, certain jurisdictions, including the State of Alabama and its political subdivisions, are required to preclear any change in a "standard, practice or procedure with respect to voting different from that in force or effect on November 1, 1964," by seeking approval of such a change from either the United States District Court for the District of Columbia or the Department of Justice. *See* 42 U.S.C.A. § 1973c (West 1981).⁹ The only issues before the three-judge court in a challenge to a jurisdiction's failure to preclear a change are "(1) whether [the] change is covered by § 5, (2) if the change is covered, whether § 5's approval requirements have been satisfied, and (3) if the requirements have not been satisfied, what relief is appropriate." *McCain v. Lybrand*, 465 U.S. 236, 250 n.17 (1984). We need not consider the second factor because it is not disputed that none of the changes at issue in this case has in fact been precleared.

It is well established that in deciding the coverage issue, "it is not our province . . . to determine whether the changes at issue in this case in fact resulted in impairment of the right to vote, or whether they were intended to have that effect . . . Our inquiry is limited to whether the challenged alteration has the *potential* for discrimination." *NAACP v. Hampton County Election Comm'n*, 470

⁹With respect to certain jurisdictions, the relevant benchmark dates are November 1, 1968, or November 1, 1972. *See* 42 U.S.C.A. § 1973(b) (West 1981).

U.S. 166, 181 (1985) (emphasis in original).¹⁰ As a general matter, it is also established that section 5 should be interpreted so as to give it "the broadest possible scope," see *United States v. Sheffield Board of Comm'rs*, 435 U.S. 110, 122-23 (1978); *Allen v. State Board of Elections*, 393 U.S. 544, 567 (1969), and that Congress intended to reach all changes affecting voting, no matter how small or minor, see *Allen*, 393 U.S. at 566, 568; 28 C.F.R. § 51.12 (1989). As Judge Vance noted in his opinion for the court in *Hardy v. Wallace*, 603 F. Supp. 174, 178 n.6 (N.D. Ala. 1985) (three-judge court), "[t]he courts and Congress have sent a clear message to allow § 5 a wide scope to combat subtle and insidious evasions of the law." Furthermore, it is immaterial whether a change occurs formally or informally, through state statute, local ordinance or resolution, or administrative act. See *Hampton*, 470 U.S. at 178.

Because of the factual posture of this case with regard to Etowah County, we must address the issue of the relevant benchmark against which to measure a purported "change" for section 5 purposes. In assessing whether a purported change is in fact a "change affecting voting," the language of section 5 suggests that the change should be compared only with the regime "in force or effect on November 1, 1964." See 42 U.S.C.A. § 1973c (West 1981); see also 28 C.F.R. § 51.2 (defining "change affecting voting"). The regulations governing the Department of Justice's substantive consideration of a change after it has been submitted for preclearance provide, however, that in assessing the discriminatory or retrogressive effect of a change, the proper benchmark for comparison is the regime "in effect at the time of the submission," taking into account duly precleared changes which have occurred subsequent to the original statutory benchmark date. See 28 C.F.R. § 51.54(b)(1). The foregoing approach strongly implies that the initial assessment of whether a change affecting

¹⁰See also *Allen v. State Board of Elections*, 393 U.S. 544, 558-59 (1969) ("The only issue is whether a particular [change] is subject to the provisions of the Voting Rights Act, and therefore must be submitted for approval before enforcement."); *Robinson v. Alabama State Dep't of Education*, 652 F. Supp. 484, 486 (M.D. Ala. 1987) (three-judge court) (Thompson, J.) ("[A] three-judge court . . . need not determine, indeed should not determine, whether a change has in fact had a discriminatory purpose or effect . . . The question, instead . . . is whether the change has the potential for discrimination.").

voting has in fact occurred should also rest on a comparison, not simply with the regime prevailing in 1964, but with that regime as modified by any subsequent duly precleared changes. Notwithstanding the plain statutory language, which might be read to require otherwise, this Court has previously interpreted section 5 in accordance with the foregoing approach. See *Henderson v. Graddick*, 641 F. Supp. 1192, 1201 (M.D. Ala. 1986) (Johnson, Hobbs, and Thompson, JJ.) (per curiam), *appeal dismissed*, 479 U.S. 1023 (1986) ("Once a law has been precleared . . . any change in the law or any practice inconsistent with the law must itself be precleared or be a violation of Section 5."); see also *Kirksey v. Allain*, 635 F. Supp. 347, 348 (S.D. Miss. 1986) (three-judge court) (holding subject to preclearance any voting law "which is different from that in force and effect on November 1, 1964 . . . or which is different from a statute that has been precleared pursuant to § 5"); *Dotson v. City of Indianola*, 521 F. Supp. 934, 943 (N.D. Miss. 1981) (three-judge court), *summarily aff'd*, 456 U.S. 1002 (1982) (rejecting city's attempt to revert without preclearance to 1964 boundaries, where elections had been conducted since 1964 in accordance with post-1964 annexations which were themselves ultimately precleared). We therefore measure the purported changes in this case against the benchmark of the 1964 regime as modified by any intervening duly precleared changes.

The disputed changes in this case do not fall readily into the traditionally recognized categories of changes affecting voting, such as rescheduling of elections and filing periods, see *id.* at 176-81, changes in candidate residence requirements, see *Rome v. United States*, 446 U.S. 156, 160-61 (1980), annexations, see *Richmond v. United States*, 422 U.S. 358, 362 (1975), reapportionment and redistricting plans, see *Georgia v. United States*, 411 U.S. 526, 535 (1973), locating of polling places, see *Perkins v. Matthews*, 400 U.S. 379, 387 (1971), or marking ballots so as to identify voters, see *Turner v. Webster*, 637 F. Supp. 1089, 1091-92 (N.D. Ala. 1986) (three-judge court) (Vance, J.). The Supreme Court has noted in dicta, however, that "reallocation[s] of authority" among government officials or bodies may constitute changes affecting voting under section 5. See *McCain*, 465 U.S. at 250 n.17.

In *Horry County v. United States*, 449 F. Supp. 990 (D.D.C. 1978)

(three-judge court), a case arising from South Carolina, the court addressed a change in county governmental structure from a system where county commissioners were appointed by the state governor upon the recommendation of the county's state legislative delegation to a "home rule" council-administrator system with the members and chairman of the council elected at large by the voters of the county. Under the old system, the chairman of the board of commissioners had also been elected at large by county voters. While the chairman of the board of commissioners under the old system "had direct charge of construction and repair of all roads and bridges in the county," *id.* at 993, however, the chairman of the new county council had no more power than any other commissioner, except for the authority to call special meetings on short notice. *See id.* at 994. "[T]he administrative functions formerly performed by the chairman of the County Board of Commissioners are performed by the administrator employed by the Council." *Id.* The court held that the fundamental change from appointment to election as a means of choosing the county's governing body was subject to section 5 preclearance. *See id.* at 995. The court also held:

An alternative reason for subjecting the new method of selecting the Horry County governing body to Section 5 preclearance is that the change involved reallocates governmental powers among elected officials voted upon by different constituencies. Such changes necessarily affect the voting rights of the citizens of Horry County, and must be subjected to Section 5 requirements.

Id.

In *Sumter County Council v. United States*, 555 F. Supp. 694 (D.D.C. 1983) (three-judge court), which, like *Horry*, involved a change in county governance under South Carolina's Home Rule Act, the county contended that no change affecting voting had taken place because both the county legislative delegation, which by custom had exercised *de facto* power to choose the county commissioners and govern the county, and the new county council were elected at large. The court found this argument "facile" because it

simply ignore[d] the Governor's *de jure* power -[prior to the change] to appoint the county's governing body, the Governor's *de jure* power to veto legislation (including local bills for Sumter and other counties) and the *de jure* power of the entire General Assembly to enact local laws for Sumter County different from those recommended by the Sumter County delegation. The . . . argument also ignores the legal fact that the Governor and the majority of the legislators who had the actual and legal powers to govern Sumter County were not elected at-large by the voters of Sumter County; they were elected by the voters of the entire State of South Carolina.

Id. at 700-701 (footnote omitted). The court's conclusion that the change affected voting and was covered by section 5 appears to have been based in large part on its finding that "[i]t eliminated the power of South Carolina voters outside Sumter County over that County's local affairs." *Id.* at 701. Like *Horry, Sumter* thus involved a reallocation of authority among "officials voted upon by different constituencies."

In *Hardy v. Wallace*, 603 F. Supp. 174 (N.D. Ala. 1985) (three-judge court), the court reviewed a change affecting the method of choosing the Green County Racing Commission. The Commission had consisted of three members appointed by the local state legislative delegation. Following federal court approval of a reapportionment plan which made it likely that Greene County would elect a black state senator and a black state representative, the state legislature, at the instigation of Greene County's incumbent white legislators, passed a law giving the governor power to appoint all three members of the Commission. *See id.* at 175-76. The court, noting that "[t]he most relevant attribute of the challenged act is its effect on the power of the voters rather than any aspect of the electoral process," *id.* at 178, found the change covered by section 5 because it reallocated authority over an agency handling the bulk of the county's revenue from officials subject to indirect local control and chosen by legislators responsible only to local voters, to officials chosen by the governor, more than 99% of whose constituents lived outside the county. *See id.* at 179. *Hardy* thus involved an extreme example of the kind of real-

location found covered in *Horry* and *Sumter*. The court cautioned, however, that

[t]he ordinary or routine legislative modification of the duties or authority of elected officials or changes by law or ordinance in the makeup, authority or means of selection of the vast majority of local appointed boards, commissions and agencies probably are beyond the reach of section 5, even given its broadest interpretation.

Id. at 178-79. The court noted that its "conclusions in this case are reached within the ambit of its peculiar facts," and "should not be read to support a requirement of section 5 preclearance in the myriad of conceivable situations that are somewhat analogous but lack the attributes that we have expressly found to be determinative." *Id.* at 179.

Finally, we note that in *Robinson v. Alabama State Dep't of Education*, 652 F. Supp. 484 (M.D. Ala. 1987) (three-judge court) (Thompson, J.), the court found covered under section 5 a transfer of authority over the City of Marion's public schools from the Perry County Board of Education, whose members were elected county-wide, to a new Marion City Board of Education appointed by the city council, whose members were elected city-wide. The court found that the change affected voting because it "changed the *constituency* that selected those who supervised and controlled public schools within the city." *Id.* at 486 (emphasis in original).¹¹ The potential for discrimination in *Robinson* was especially obvious because the voting-age population of Perry County was 60% black, while Marion was 52% white. *See id.* at 485.

The principle we draw from *Horry*, *Sumter*, *Hardy*, and *Robinson* is that reallocations of authority will generally be held to affect voting in a manner sufficient to subject them to preclearance under section 5 where they effect a significant relative change in the powers exercised by governmental officials elected by, or re-

¹¹The court also found the change covered by section 5 because it "changed the *means* by which the board members who governed city schools were selected," from a system of direct election by county voters to a system of appointment by the city council. *Id.* (emphasis in original).

sponsible to, substantially different constituencies of voters.¹² The potential for discrimination in most such reallocations derives from the fact that identifiable racial or ethnic groups of voters will often have different levels of voting strength in different constituencies. This general principle must be tempered, however, by *Hardy*'s implicit admonition that relatively minor or inconsequential reallocations of authority, even though involving some shift in authority between local officials with different constituencies, will not *invariably* rise to the level of a change with significant potential impact on voting rights. See *Hardy*, 603 F. Supp. at 178-79. For example, *Sumter* and *Hardy* suggest that section 5 preclearance is most clearly indicated where all or virtually all of the powers of a given governmental body are shifted to officials with different constituencies. At the same time, we hasten to observe that we do not presume to have stated a "general theory" of reallocations of authority applicable to all conceivable section 5 cases. It is conceivable, though we think unlikely, that some reallocations of authority not involving officials with different constituencies might nevertheless have significant potential impact on voting rights. Given the facts of this case, however, we need not explore such a hypothetical possibility.

¹²The dissent misconstrues both *Horry* and our reliance upon *Horry* in criticizing the reasoning by which we draw this principle from the four cases discussed above. The dissent asserts that "[n]one of these cases purports to say that a reallocation of authority can have a potential for discrimination *only if* there is a change in constituencies," dissenting op. at 12 [A-11] (emphasis in original), while ignoring the fact that all four of these cases in fact involved reallocations between officials with dramatically different constituencies. We do not suggest that the principle we derive can be lifted verbatim from any of these cases; it is in the very nature of caselaw development to draw inferences and make logical extensions from the holdings and factual contexts of previous cases. The "alternate reason" relied upon by *Horry* for holding the change in that case subject to preclearance, upon which the dissent focuses, did not involve the reallocation-of-authority theory at all, but rather referred to a change in the means of selecting an entire governmental body. We agree that such a change would probably require section 5 preclearance, but as discussed below in Part II(B)(1), no such change is implicated in this case. Our reliance upon *Horry* and the other cases is limited to the context of reallocations of authority, and *Horry* explicitly limited its reliance on the *reallocation-of-authority theory* to those cases involving reallocations "among elected officials *voted upon by different constituencies*." *Horry*, 449 F. Supp. at 995 (emphasis added).

We now proceed to apply the principles discussed above to the disputed changes in this case. In doing so, we note that while the Department of Justice urges us to find these disputed changes covered by section 5, the regulations issued by the Department do not provide any specific guidance on the coverage of reallocations of authority.¹³ While it is established that the Department's interpretation of section 5 is entitled to "considerable deference," *Hampton*, 470 U.S. at 178-79; see also *Sheffield*, 435 U.S. at 131, that interpretation is "not binding on this or any other court." *Lucas v. Townsend*, 698 F. Supp. 909, 911 (M.D. Ga. 1988) (three-judge court). We believe that is especially so where the Department has not formalized its interpretation by promulgating applicable regulations. Therefore, while we give careful and deferential consideration to the views of the Department as *amicus curiae*, we reach an independent judgment on the issues presented here.¹⁴

¹³The Department has stated: "While we agree that some reallocations of authority are covered by Section 5 (e.g., implementation of 'home rule'), we do not believe that a sufficiently clear principle has yet emerged distinguishing covered from noncovered reallocations to enable us to expand our list of illustrative examples in a helpful way." 52 Fed. Reg. 486, 488 (Jan. 6, 1987).

¹⁴In addition to the reallocation-of-authority theory, the plaintiffs and the Department of Justice urge reliance on *Dougherty County Board of Education v. White*, 439 U.S. 32 (1978), where the Supreme Court found covered under § 5 a local Board of Education rule requiring employees who became candidates for elective office to take unpaid leaves of absence. See *id.* at 34-35, 43. *Dougherty's* reasoning was relied upon in *Huffman v. Bullock County*, 528 F. Supp. 703 (M.D. Ala. 1981) (Hobbs, J.), where the court, on a motion for preliminary injunction, held that success was likely on a claim that Bullock County's newly-imposed requirement that the county probate judge, rather than the Bullock County Commission, pay the salaries of the probate judge's office staff was subject to § 5 preclearance. See *id.* at 704-06. The reasoning of *Dougherty* and *Huffman* was that the disputed changes in those cases had a discriminatory "potential for inhibiting participation in the electoral process," *Dougherty*, 439 U.S. at 42, because they imposed new financial burdens on elected officials or "erect[ed] 'increased barriers' to candidacy." *Id.* at 43; see also *Huffman*, 528 F. Supp. at 706. The plaintiffs and the Department of Justice argue that because the disputed changes in this case all reduce in some manner the autonomy or political potency of at least some of the county commissioners in Russell and Etowah Counties, those changes similarly constitute potentially discriminatory burdens or barriers to political candidacy or participation. We find *Dougherty* and *Huffman* basically inapposite, however. The changes at issue here do not create any obstacles or financial burdens to seeking or holding office which might discriminatorily impact on certain candidates as opposed to others. To the extent the changes devalue or render

B. *Application*

1. Russell County

Because the 1979 change in Russell County reallocated authority over road operations from the individual elected commissioners, acting autonomously under the district system, to a single, appointed county engineer under the unit system, the change might, at first glance, appear covered by section 5. One crucial fact, however, militates decisively against section 5 coverage: Both before and after the 1979 change, the official responsible for road operations in each district was elected by, or responsible to, all the voters of the county. Thus, there was no *change* in the potential for discrimination against minority voters. To employ a hypothetical suggested by the Department of Justice, if a county commission which consisted of members elected from single-member constituencies, *and* which followed a district system of autonomous road supervision, were to shift to a unit system placing authority in a single county-wide official, such a change might well be covered by section 5 under the reasoning of *Horry*, *Sumter*, *Hardy*, and *Robinson*. Under such a change, the voters in each district would lose their ability to elect an official with direct authority over their district's affairs; rather, they would have to share influence with all other voters of the county over the official with authority over their district's affairs. The potential for discriminatory vote dilution in such a situation, where one or more districts has a black voting majority but blacks are outvoted in the county as a whole, is too obvious to require discussion. The foregoing hypothetical is not this case, however. Prior to 1985, the individual commissioners in Russell County, while they had to be residents of the districts assigned to their respective seats, were elected by, and thus politically responsible to, *all* the voters of Russell County. The transfer of authority to the county engineer, an official appointed by and directly responsible to the Commission, a body also elected by and politically responsible to all the

less politically effective any particular county commissioner's office, the changes obviously impact all potential candidates for that office equally. For the reasons discussed in text, the relevant inquiry in this case concerns the potential impact of the changes on the effective representation of different voting constituencies.

voters of the county, thus effected no significant change in the influence wielded by the voters of any district.¹⁵

It is true that *Robinson* might be read to suggest that any shift of authority from an elected to an appointed official requires preclearance under section 5. See note 11, *supra*. We must reject such a suggestion as applied to this case, however, in view of *Robinson's* predominant reliance, along with *Horry*, *Sumter*, and *Hardy*, on the potentially discriminatory impact on different voting constituencies. In *Robinson*, the shift was from elected officials responsible to a county-wide electorate to appointed officials responsible only to a city-wide electorate. Here the shift was from an official elected county-wide to an official appointed by a body also elected county-wide. There simply was no potentially differential impact on different voting constituencies. We note that there was no change in 1979 in the method of choosing either the commissioners or the county engineer. Cf. *Horry*, 449 F. Supp. at 993-95 (fundamental change in method of choosing county governing body, from gubernatorial appointment on recommendation of local legislative delegation to direct local election, covered by section 5). The 1979 change simply shifted direct supervision

¹⁵The dissent relies heavily on the argument that the voters of a given district exercised more authority over the commissioner from that district than over the county engineer because the district residency requirement limited the potential challengers to each commissioner to residents of that district, and on the related argument that the commissioner probably felt a natural affinity for the district in which he resided. We conclude, however, that any such effects flowing from the residency-district system would simply have been *de minimis* for present purposes. The dissent's contrary argument places undue emphasis, we believe, on the district court's finding in *Anthony v. Russell County*, Civil Action No. 961-E, man. op. at 1 (M.D. Ala. Nov. 21, 1972) (Varner, J.), that the rural commissioners of Russell County had "heretofore devoted their attention almost solely to the affairs of the district in which such member[s] reside[d]." The issue in *Anthony*, however, was the validity of the grossly malapportioned residency-district system then prevailing in Russell County, in which more than 50% of the county's voters were apportioned to only one of the three residency districts. Nothing in our reasoning in this case even remotely questions the invalidity — as determined by *Anthony* — of such a malapportionment. We merely hold that the relatively tangential impact of a residency-district system on an at-large commissioner's fundamental political loyalty to his entire at-large constituency, in the context of assessing a shift in authority over one area of county governance from individual at-large commissioners to an entire commission, is simply too indirect and attenuated to render such a shift a "change affecting voting" within the meaning of Section 5.

over one area of county governance from the individual at-large commissioners to the county engineer. To hold that any such shift, without more, requires section 5 preclearance would drastically expand section 5's coverage to reach even the most "ordinary or routine . . . modification[s] of the duties or authority of elected officials," in direct contravention of *Hardy*. See *Hardy*, 603 F. Supp. at 178.

We emphasize that section 5 reaches only changes with a potentially discriminatory impact on voting. See *Beer v. United States*, 425 U.S. 130, 138-39 (1976);¹⁶ see also *id.* at 141 ("[T]he purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a *retrogression* in the position of racial minorities with respect to their effective exercise of the electoral franchise.") (emphasis added). Thus, to the extent the plaintiffs' claim in this case is that the unit system of handling road operations has a built-in potential for discrimination because of the county engineer's lack of accountability to the voters of any individual district, as opposed to the entire county at large, the claim fails under section 5 because the same potential existed under the previous district system.¹⁷

For these reasons, we conclude that Russell County's shift from the district to the unit system of managing its road operations, as reflected in the May 18, 1979 resolution and the July 30, 1979 statute, is not subject to preclearance under section 5.

2. Etowah County's Common Fund Resolution

Etowah County's 1987 common fund resolution raises somewhat different issues from Russell County's 1979 change, but our conclusion is the same. It is true that the reallocation of authority embodied in the common fund resolution involved officials with different voting constituencies. As of August 1987, when the resolution was passed, the 1986 consent decree mandating a shift

¹⁶*Beer* held that a reapportionment plan's retention of two at-large city council seats was not subject to section 5 preclearance because the at-large seats had existed prior to November 1, 1964. See *id.*

¹⁷By the same token, nothing in our decision today precludes the plaintiffs' section 2 and related substantive claims, still pending before the district court, that the unit system in Russell County has in fact been administered with the purpose or effect of racial discrimination.

from at-large to district elections for the Etowah County Commissioners had been in effect for eight months. Two commissioners as of August 1987 had been elected from new single-member districts, and the four remaining commissioners each faced the prospect of reelection (or defeat) from single-member districts (whose boundaries were already fixed) in either 1988 or 1990. We conclude, however, that the reallocation of authority embodied in the common fund resolution was, in practical terms, insignificant in comparison to the entire Commission's authority, both before and after the disputed change, to allocate funds among the various districts, and thus to effectively authorize or refuse to authorize major road projects on the basis of a county-wide assessment of need.

The plaintiffs suggested at oral argument that they sought the political "bargaining power" that would come from having each individual commissioner control one sixth of the county-wide road budget. We find as a matter of fact, however, that the individual commissioners were never, prior to the common fund resolution, given equal prorated shares of the budget over which they could exercise exclusive individual control, such that subsequent shifts in budget allocation among the districts proceeded on some kind of "horse-trading" basis. Rather, at most, the individual commissioners may have been able to set priorities regarding the expenditure of whatever portions of the road budget the entire Commission saw fit to allocate to their respective districts. It is clear that the power to set the internal spending priorities of a given quantum of budget authority pales dramatically in comparison to the power to allocate the *amount* of such budget authority in the first place. In view of the fact that the authority reallocated by the common fund resolution constituted, at most, only a small portion of one aspect of Etowah County's governmental powers, we conclude that the reallocation was simply too minor and inconsequential to amount to a change affecting voting. The common fund resolution effected no shift in authority between officials with different constituencies as to the overwhelmingly decisive and controlling budgetary powers exercised by the Etowah County Commissioners, because such ultimate budgetary powers have always been exercised by the entire Commission.

We therefore conclude that the common fund resolution is not subject to preclearance under section 5.¹⁸

3. Etowah County's Road Supervision Resolution

We reach a different conclusion with regard to Etowah County's 1987 road supervision resolution. The potential for discrimination posed by this change is blatant and obvious. Whereas before 1987 all the voters of Etowah County participated in choosing the commissioners responsible for road management, the 1987 resolution stripped the voters in districts 5 and 6 of any electoral influence over such commissioners.¹⁹ Authority over the most important aspect of county governance was shifted from officials responsible to the entire county to officials (albeit the

¹⁸Of course, any system allowing a county-wide majority to set road budget priorities for every district of a county has an obvious built-in potential for discriminatorily overriding the interests of certain districts, as the repeated passage of Etowah County's road budget by 4-2 votes illustrates. But the relevant factor, as discussed above with regard to Russell County, is that the same basic potential existed both before and after the 1987 common fund resolution. As noted above with regard to Russell County, *see* note 17, *supra*, nothing in our decision today precludes the plaintiffs from maintaining their section 2 and related substantive claims against Etowah County. We in no way prejudice or suggest any view as to the merits of those claims. The plaintiffs' complaints about inequitable road budgets being forced through by 4-2 votes, and Etowah County's rejoinder that Presley's and Williams's districts have in fact received a disproportionately high amount of county road funding per county road mile, are arguments best directed to the district court in connection with those substantive claims.

¹⁹Etowah County suggests that the allocation of authority over road operations to the four holdover commissioners was appropriate because of the extremely small percentage of county road mileage located within Presley's and Williams's districts. Under the previous at-large election system however, the voters in what are now districts 5 and 6 exercised one-third of the voting power over the commissioners responsible for road operations; thus, regardless of the percentage of county road mileage in those two districts, the 1987 change marked a substantial reduction in those voters' influence over road operations. We note that apportioning voting power over road funding on the basis of county road mileage, aside from being a section 5-covered change under the circumstances of this case, would be inconsistent with the basic principle of one-person/one-vote. *See Reynolds v. Sims*, 377 U.S. 533, 562 (1964) ("Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests.") (affirming and remanding *Sims v. Frink*, 208 F. Supp. 431 (M.D. Ala. 1962) (Rives, Thomas, and Johnson, JJ.) (per curiam)).

same individuals) responsible to only two thirds of the county's voters. While it is not the province of this court to decide whether this change in fact violated the 1986 consent decree or otherwise had an actual discriminatory purpose or effect, we have no difficulty concluding that the change had such a *potential*, and is thus subject to section 5 preclearance.²⁰

III. CONCLUSION

We turn finally to the question of appropriate relief.²¹ Because Etowah County's 1987 road supervision resolution was subject to

²⁰Etowah County contends that Commissioner McKee, one of the four holdover commissioners, has on occasion offered to trade his road supervision responsibilities with Presley's assigned responsibilities under the 1987 resolution, and that Presley has declined. It appears that this offer was not seriously intended, and in any event such an informal offer by a single commissioner would be of dubious validity, and irrelevant to determining the preclearance issue as to the 1987 resolution.

More significantly, Etowah County points out that on January 23, 1990, the Etowah County Commission (with Williams voting "no" and Presley absent) passed a resolution providing, in relevant part:

4. Minor road repair, such as repair of potholes, and general road maintenance, such as grass cutting, shall not be subject to a vote of the Commission, but shall be determined by the Commissioner responsible for the district where such general maintenance and minor repair must be done.

5. With respect to the supervision of major and minor road repair and construction, each Commissioner shall supervise the work performed in his district.

6. With respect to the daily routine operation of each road shop, each Commissioner assigned to each road shop shall continue to supervise said operations.

Etowah County argues that this resolution moots the preclearance issue as to the 1987 resolution. It is clear, however, that the 1990 resolution does not entirely undo the changes wrought by the 1987 resolution. In any event, because no party has raised a section 5 preclearance claim regarding the 1990 resolution, it is not properly before this court. The 1990 resolution may simplify Etowah County's task in complying with the relief ordered in this case, but that need not concern us at this stage. If Etowah County chooses to treat the 1987 resolution, or any part of it, as repealed, and, by declining to seek preclearance of its as ordered in Part III below, chooses (as ordered in the alternative below) not to enforce it, Etowah County is perfectly free to do so.

²¹We must respectfully take issue with the dissent's assertion that we have exceeded our jurisdiction as a three-judge court. As we have emphasized, *see* notes 17 & 18, *supra*, nothing in our decision today prejudices the plaintiffs'

section 5 preclearance but was not precleared, it should never have been enforced in the first place. The presumptive remedy where a section 5 violation is found is to enjoin enforcement of the covered change until and unless it is precleared. *See Perkins*, 400 U.S. at 396 ("Congress expressly indicated its intention that the States and subdivisions, rather than citizens seeking to exercise their rights, bear the burden of delays in [section 5] litigation."). The Court in *Perkins* indicated, however, that "[i]n certain

section 2 and related substantive claims currently pending before the district court. We do not reach the question whether black voters are denied equal voting rights under the governmental regimes currently prevailing in Russell or Etowah Counties. We merely assess, as we are required to do in accordance with our limited jurisdiction, whether the disputed *changes* in this case have any potential impact on voting sufficient to raise them to the level of "changes affecting voting." The dissent seems to overlook the fact that reallocations of authority *as such* do not, without more, have any obvious relation to voting rights; in assessing the section 5 coverage of reallocations of authority, we tread a path at the far edges of the domain of section 5 law. We are baffled, moreover, by the dissent's charge that the principle we have drawn from the relevant caselaw "is not a *legal* conclusion but a *factual* one." Dissenting op. at 12 [A-12] (emphasis in original). We do not rely on the four principal cases we have cited for any factual conclusions, and we certainly do not "attempt[] to decide how reallocations of authority work in all situations." *Id.* Rather, we agree with those cases, as a matter of simple logic, that reallocations of authority, in order to constitute "changes affecting voting," will normally have to be shown to involve officials with different voting constituencies. A specific conclusion that any given change in fact "affects voting" requires factual findings based on the record in each case. In *Dougherty*, 439 U.S. at 40-43, for example, the Supreme Court relied on factual findings that the leave-of-absence rule there at issue "impos[ed] substantial economic disincentives on employees who wish to seek elective office . . . burden[ed] entry into elective campaigns and . . . limit[ed] the choices available to [the] voters." *Id.* at 40. These findings were essential to the Court's conclusion that the challenged change "affected voting." *See id.* at 43. In this case, likewise, we must reach and decide the inherently factual threshold issue of whether the disputed reallocations of authority had any significant potential impact on voting rights.

The dissent concedes, as it must, that "there is no bright line separating an inquiry as to whether a change has a potential for discrimination from an inquiry as to whether a change is in fact discriminatory." Dissenting op. at 10. We believe this observation is especially true where, as here, we deal with purported "changes affecting voting" so far removed from the kinds of practices and policies affecting voting to which the Voting Rights Act was originally and primarily addressed. It seems to us that the dissent would resolve the recurrent problem of fixing an outer boundary on the scope of section 5 by automatically expanding, where in doubt, the scope of coverage. A line must finally be drawn somewhere, however, if section 5 is not to be stretched beyond the point of reason and beyond its legitimate purposes. We

circumstances . . . it might be appropriate to enter an order affording local officials an opportunity to seek federal approval and [enjoining the change] only if local officials fail to do so or if the required federal approval is not forthcoming." *Id.* at 396-97; *accord, e.g., Berry v. Doles*, 438 U.S. 190, 192-93 (1978) (officials given 30 days to apply for preclearance); *Robinson*, 652 F. Supp. at 486-87 (officials given 60 days to obtain preclearance). Under the circumstances of this case, we conclude that the appropriate remedy for Etowah County's section 5 violation is to require Etowah County to apply forthwith for preclearance of the 1987 road supervision resolution. If Etowah County chooses not to apply, or if preclearance is not obtained within 60 days from the date of this order,²² Etowah County shall be enjoined from enforcing the resolution.

It is so ordered.

This 1st day of August, 1990.

/s/ Frank M. Johnson, Jr.

Frank M. Johnson, Jr.
United States Circuit Judge

/s/ Truman M. Hobbs

Truman M. Hobbs
United States Chief District Judge

Myron H. Thompson
United States District Judge

believe the line we have drawn in this case is faithful to those purposes and to the governing caselaw.

²²The Department of Justice gave assurances at oral argument that any such request for preclearance would receive accelerated consideration, and we expect that those assurances will be honored.

HOBBS, J., concurring:

I agree fully with the careful opinion of Judge Johnson.

By its plain language, Section 5 of the Voting Rights Act requires federal preclearance before a political subdivision in certain states may enforce a change in "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting." Section 5 marked a radical departure from the judicial concept of constitutional federalism and represented an "uncommon exercise of congressional power." *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966). As Justice Powell noted in his dissent in *Dougherty County Board of Education v. White*, 439 U.S. 32, 38, the departure was viewed by some members of the Supreme Court as such a distortion of the constitutional structure of government as to violate the Constitution.

Section 5 of the Voting Rights Act was squarely aimed at, and by its terms was limited to, correcting abuses which could arise from changes in "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting," and as so limited, it has been upheld against constitutional challenge. No one on this court questions that the Voting Rights Act requires preclearance of all changes in voting practices or procedures which directly affect voting irrespective of whether such changes have any apparent potential for discrimination.

As Judge Johnson's opinion makes clear, however, the instant cases do not involve the usual categories of changes affecting voting, such as rescheduling of elections, changes in polling places, changes in candidates' residence requirements, reapportionment or redistricting plans, etc. In cases such as the instant cases, Congress did not intend and courts should not require the burdensome, time-consuming process of preclearance by the Attorney General of the United States for the mere reallocation of administrative responsibilities of officials unless the change has at least a significant, potential impact on the electoral process.

The United States, filing as amicus curiae, and the plaintiffs rely on *Dougherty County Board of Education v. White*, 439 U.S. 32 (1978). Justice Marshall, speaking for the Court, noted that the change in *Dougherty*, which "increased barriers" to candidacy, arose out of a factual context which was "sufficiently suggestive of the potential for discrimination to demonstrate the need for

preclearance." *Id.*, 439 U.S. at 42. In *Dougherty*, the "barrier" was adopted less than a month after the first black in recent years sought election to the county governing body. In Russell County, however, the administrative change was adopted many years before blacks sought a place on the governing body and was adopted to eliminate a practice that had proved inefficient and conducive to abuses. Indeed, the practice of Russell County eventually resulted in a criminal indictment of one of the commissioners. Moreover, in the Russell County case, the resolution adopted in 1979 involved no "increased barrier" to anyone's candidacy; the change did not arise out of a factual context which even remotely suggests a potential for discrimination or discriminatory purpose. In *Dougherty*, Justice Marshall, speaking for the Court, found that the change could have a significant impact on the electoral process. I agree fully with the opinion of Judge Johnson that Russell County's 1979 shift from the district to the unit system of managing its road operation could have no such impact on the electoral process of Russell County and is not subject to preclearance.

In *Dougherty*, five members of the Court agreed that the holding in *Dougherty* went beyond congressional intent which only required preclearance of changes in practices "with respect to voting." Justice Stevens concurred in the result to make a majority only because he felt so compelled by the Court's prior decisions. *Dougherty, supra*, at p. 47. Justice Powell's dissent stated that if the rule adopted in *Dougherty* is subject to preclearance, "it is difficult to imagine what sorts of state or local enactments would not fall within the scope of that [preclearance] section." *Dougherty, supra*, at p. 54. This is the concern of defendant Russell County in this case and it is my concern. If this longstanding practice of Russell County, adopted in 1979 without even a suggestion that it is discriminatory in origin or effect, with no logical basis for determination that it could have a significant impact or indeed any impact on the electoral process, requires preclearance by the Attorney General of the United States, it is difficult to imagine what administrative change at a local level is not subject to preclearance. Clearly, this was not congressional intent in Section 5 in requiring of certain states preclearance of changes with "respect to voting."

I agree with Judge Johnson's determination that Etowah County's common fund resolution does not require preclearance. I further agree with his determination that the Etowah County road supervision resolution has a potential for discrimination which "could be significant" and could impact significantly on the electoral process in Etowah County, *Dougherty, supra*, at p. 47, thus requiring preclearance in accordance with prior decisions of the Supreme Court.

THOMPSON, J., concurring in part and dissenting in part:

I concur in the court's judgment as to the Etowah County Commission's 1987 road supervision resolution. However, as I will explain below, I must respectfully dissent from the majority's disposition of the Etowah County Commission's 1987 common fund resolution and the Russell County Commission's 1979 reallocation of authority over road operations from individual commissioners to the county engineer. I agree with the plaintiffs and the United States that the plaintiffs are entitled to appropriate relief with regard to these two changes as well.¹

I.

As to Etowah County's common fund resolution, I fully agree with the majority's introductory review of established case law under § 5 of the Voting Rights Act of 1965, as amended.² However, I disagree with the result the majority then reaches in determining whether the resolution has the "*potential* for discrimination." *NAACP v. Hampton County Election Comm'n*, 470 U.S. 166, 181, 105 S.Ct. 1128, 1137 (1985) (emphasis in original). I do not think that the majority gives consideration to the full significance of the resolution and the critical role it could be viewed as having played in the over-all scheme for redistribution of authority among the county's commissioners. I believe that a trier of fact *could* readily reach the following conclusions about the common fund resolution.³

Prior to 1987, the Etowah County Commission was composed of four commissioners elected at-large from four residency districts and a chairperson elected at-large without a residency requirement.⁴ The four commissioners were primarily responsible for road and bridge matters. Each maintained separate and inde-

1. The relief fashioned by the court with regard to the Etowah County Commission's road supervision resolution is appropriate. However, I would fashion similar relief for all the changes being challenged.

2. 42 U.S.C.A. § 1973c.

3. I emphasize "could" because it is not within the province of this three-judge court to make any final findings resolving disputed facts as to whether there has been discrimination.

4. Because the responsibilities of the chair are not critical to my disagreement with the majority's holding, I have not again described those responsibilities as they existed before and after the consent decree.

pendent authority over road and bridge repair and construction within his residency district, and each had a "county shop" within his district, with its own road crew and equipment. Each also had separate funds for his district, which he could use at his discretion. Because the four commissioners spent 90% of their time on road and bridge matters, they were known as "road commissioners".

The 1986 consent decree provided for the phasing in of a structure in which the commission will have six members elected from single-member districts rather than at-large. Under the decree, two new commissioners were elected from single-member districts in December 1986 and took office in January 1987. One of the two commissioners is black and was elected from District 5, a majority-black district created under the consent decree. These two new commissioners joined the four white incumbent or "holdover" commissioners who had been elected at large from the old residency districts.

On August 25, 1987, less than nine months after the county's first black commissioner took office, the four holdover commissioners passed two resolutions which dramatically restructured the distribution of authority within the commission. The resolutions passed four to two, with the two new commissioners voting no. The two resolutions, working together, effectively placed beyond the reach of the two new commissioners and preserved for the four holdover commissioners the separate and independent fiefdoms the four had enjoyed prior to the consent decree. The first resolution — known as the road supervision resolution — expressly provided that the holdover commissioners would continue to maintain exclusive control of the four road shops as they had done in the past, although one of the road shops is physically located in District 5, the majority-black district.

The second resolution — known as the common fund resolution — provided in its first section that for the fiscal year 1987-88 the commission would no longer have separate district funds subject to the control of each commissioner, but would have a common fund under the control of the entire commission. At first blush, it would appear that the second resolution simply and evenhandedly abolished the authority of individual commissioners to determine how funds would be used in their districts and

instead provided for majority control by the full commission over such funds. However, a closer analysis of the resolution's other provisions as well as its over-all effect reveals that this was not true and that the common fund resolution was an essential component of a larger scheme to take the control the new commissioners had over roads and bridges within their districts and give it to the four holdover commissioners so that the four could have exclusive control. First of all, section three of the common fund resolution has a grandfather clause which preserved each hold-over commissioner's control over unspent funds for the fiscal year 1986-87.⁵ This provision assured that the two new commissioners would never be able to put their hands on these unspent funds. Second, section two of the common fund resolution requires that for the fiscal year 1987-88 all road maintenance must be done out of the "four present road shops."⁶ Under this provision, commission funds cannot be used to pay outsiders for road work; instead, all funds must go to the road shops, which are, of course, because of the road supervision resolution, under the exclusive control of the four holdover commissioners.

Finally, the common fund resolution required, as noted in the majority opinion, that all road and bridge funds be in a common, unallocated fund under the control of the entire commission. This provision was, in effect, a Trojan Horse; while it appeared to place road and bridge matters under the control of the entire commission, it was actually a significant part of a larger scheme to

5. Section three of the common fund resolution provides:

That any monies earmarked and budgeted to the various districts in the fiscal year 1986-1987, for the repair, maintenance and improvement of streets, roads and public ways in the designated districts, which has not as yet been expended in the districts, shall remain in the district to which it was allocated during the 1986-1987 fiscal year. Said funds shall be carried over in the 1987-88 budget as district allocations to that district, and shall be used in that district.

The majority omits this section when it quotes from the resolution.

6. Section two of the common fund resolution provides:

That during the fiscal year 1987-1988, the repair, maintenance and improvement of all the streets, roads and public ways for Etowah County shall be accomplished by the road workers of Etowah County operating out of the four present road shops located in the County.

The majority omits this section when it quotes from the resolution.

place such control in the hands of the holdover commissioners exclusively. The provision worked as follows: on the one hand, section one of the common fund resolution abolished the authority of each commissioner, including the two new commissioners, to determine how funds will be spent in his district; but, on the other hand, the road supervision resolution and section two of the common fund resolution effectively gave it back, but only to the four holdovers. Because under section two of the common fund resolution funds can be given to only the four road shops and because under the road supervision resolution the four holdover commissioners have exclusive control over the road shops, the four holdover commissioners acquired exclusive control over all road and bridge funds. The effect of the common fund resolution, when considered with its companion resolution, was that no longer will all commissioners, including the two new commissioners, enjoy independent authority — or for that matter any authority — over funds for district roads, but rather that this authority will now be exercised exclusively by the holdover four, without interference from anyone else, and in particular the two new commissioners. The common fund resolution, while giving the appearance of innocently and simply redistributing authority back to the commission as a whole, was a pretext for excluding the two new commissioners from the budgetary process altogether. The two resolutions effectively recreated the four-person commission as it had previously existed with respect to road and bridge matters.

With this possible understanding of the facts, the potential for racial discrimination — in particular against the voters of District 5 — is evident. Prior to the passage of the two resolutions, the black voters of District 5 could elect, and indeed did elect, a representative with the same authority over road and bridge matters as had been enjoyed by the four white holdover members in the past. After the passage of the two resolutions, the black voters in this district no longer enjoyed any influence over roads and bridges; this authority was, in effect, reserved for the white holdover commissioners. In fact, looking to the reality of the situation, it could be reasonably argued that the District 5 commissioner is not a true commissioner — that is, that he is not a "road commissioner" as he was elected to be.

The circumstances surrounding the adoption of the common fund resolution and the road supervision resolution reflect not only a strong possibility of discriminatory *effect*, they raise the more serious spectre that the *purpose* behind the two resolutions was discriminatory. The resolutions were adopted shortly after black voters in the county gained, for the first time in recent history, direct and dominant political control over road and bridge operations in their district. In my view, if any change involving redistribution of authority could be considered a prototype for a change falling within § 5's coverage, these two resolutions as parts of an overall scheme could.

The majority nevertheless finds that the road supervision resolution has the potential for discrimination but that the common fund resolution does not. Because a trier of fact could reasonably conclude as follows, I do not believe the two resolutions can be separated. The two resolutions worked hand-in-hand; they complemented each other by assuring that the four holdover commissioners would continue to maintain their exclusive control over road and bridge matters. The intent behind both — to place all road and bridge matters under the exclusive control of the four holdover commissioners — was the same. First of all, they were passed in tandem. They were not isolated gestures, intended to address separate and unconnected concerns. Second, both resolutions were needed in order for the four holdover commissioners to achieve the complete control they desired; one resolution without the other would not have done this. The road supervision resolution without the common fund resolution would not have given the four commissioners this complete control, because to the extent the new commissioners could enjoy any independent control over funds for road and bridge work they would have shared in the authority exercised by the four holdovers; and, of course, the common fund resolution without the road supervision resolution would not have given the four holdovers the absolute control they desired. Third and finally, it is evident from the language of the common fund resolution itself that it is tied closely and directly to the road supervision resolution. As stated, in order to make their control over road and bridge matters complete, the four holdover commissioners included language in the common fund resolution that expressly

requires that all funds appropriated by the commission for fiscal year 1987-88 must be spent at their road shops. They also included express language preserving for the holdover commissioners exclusive control over unspent money already allocated for 1986-87.

The majority writes that a commissioner's authority to determine the use of funds within his own district is "insignificant in comparison to the entire Commission's authority, both before and after the disputed change, to allocate funds among the various districts." *Ante* at 26 [A-19]. This statement is true in a theoretical and abstract sense. However, it is not on point in this case for two reasons. First of all, the statement narrowly views the common fund resolution as consisting of only one provision — the one requiring that funds will no longer be earmarked for the unfettered use of each commissioner within his district. The resolution, however, contains two other significant provisions, which, as stated, expressly preserve earmarking for the holdover commissioners' unspent funds and which channel all future funds to the holdover commissioners' road shop for their exclusive use. The majority ignores these two remaining critical provisions in the common fund resolution.

The above statement also misses the point because it fails to take into account how the Etowah County Commission could reasonably be viewed as working in practice. For the commission, allocation of funds among the districts has never been a bone of contention; to the extent the resolution required the distribution of funds according to majority vote of the commission, it was a meaningless gesture. A commissioner's real authority lies instead, as I believe the four holdovers could be viewed as having concluded when they passed the common fund resolution, in how those funds are used after they are allocated. The common fund resolution and the road supervision resolution, working together, took this authority away from the two new commissioners and gave it exclusively to the four holdover commissioners. The majority's focus on how the whole commission retains ultimate authority over how funds are distributed among the districts is misplaced.

In conclusion, as I have said, I do not believe the majority gives adequate consideration to the full significance of the common

fund resolution and the critical role it may have played in the Etowah County Commission's over-all scheme for redistribution of authority with regard to road and bridge matters.

II.

Turning to the Russell County Commission, I believe that the majority again fails to assess fully and accurately all the evidence in the record.

The majority writes that the following hypothetical would present an obvious case of potential discrimination under established case law: "if a county commission which consisted of members elected from single-member constituencies, *and* followed a district system of autonomous road supervision, were to shift to a unit system placing authority in a single county-wide official, such a change might be covered by section 5." *Ante* at 22 [A-21] (emphasis in original). "Under such a change," the majority continues, "the voters in each district would lose their ability to elect an official with direct authority over their district's affairs; rather, they would have to share influence with all other voters of the county over the official with authority over their district's affairs." *Id.* at 22-23 [A-21]. The majority, however, concludes that § 5 does not cover the Russell County Commission's reallocation of authority over road operations from the individual commissioners to the county engineer, because "Both before and after the 1979 change, the official responsible for road operations in each district was elected by, or responsible to, all the voters of the county." *Id.* at 22 [A-21]. The majority explains that "Prior to 1985, the individual commissioners in Russell County, while they had to be residents of the districts assigned to their respective seats, were elected by, and thus politically responsible to, *all* the voters of Russell County." *Id.* at 23 [A-21] (emphasis in original). The majority then concludes that "The transfer of authority to the county engineer, an official appointed by and directly responsible to the Commission, a body also elected by and politically responsible to all the voters of the county, thus effected no significant change in the influence wielded by the voters of any district." *Id.* (footnote omitted).

The majority's broad conclusions, however, are not supported by the facts. Admittedly, it would be reasonable to assume that

commissioners elected in a pure at-large system would conclude that they are primarily accountable to the electorate of the entire county rather than that of any particular district. However, because of one significant electoral feature this has not been the case with Russell County. The county's at-large electoral system assigns each commission seat to a particular section of the county and requires that each commissioner reside in the district he represents. This requirement has played a critical role in how the commissioners and voters perceive their relationship, as is dramatically evidenced in a 1972 lawsuit brought by Phenix City against Russell County. In that lawsuit, the city claimed that it was not being adequately represented on the county commission.⁷ The suit charged, and the court specifically found, that although the three-member county commission was elected at large, "one or more members of the Commission have heretofore devoted their attention almost solely to the affairs of the district in which such member resides." *Anthony v. Russell County*, Civil Action No. 961-E, slip op. ____ (M.D. Ala. Nov. 21, 1972). The court observed that this result was due, in substantial measure, to the district residency requirement. *Id.* Although Phenix City comprised much more than 50% of the county population, it could not translate its majority into control of the commission, or any members on the commission, because two of the residency districts were located wholly outside the city. Over time, the at-large system had taken on some of the attributes of single-member districting.⁸ The court responded by increasing the number of at-large commissioners from three to five, with the two additional representatives going to the Phenix City residency district.

The majority's approach to Russell County fails to take into account the historical events depicted in *Anthony v. Russell County*; in fact, the majority discounts the possibility that those events could ever occur. To me, these events can be easily understood to reflect a long-standing and continuing practice in which the commissioners and voters in the county viewed each commissioner as

7. The 1972 lawsuit was brought by the Mayor and members of the Board of Commissioners of Phenix City.

8. A review of the entire file in *Anthony v. Russell County* reinforces this conclusion.

accountable to only the voters of his residency district, with the result that the district voters rather than all the county voters were his true constituency. *Cf. Dallas County v. Reese*, 421 U.S. 477, 480, 95 S.Ct. 1706, 1708 (1975) (per curiam) (election of county commissioners at large from residency districts with unequal populations may violate "one-person, one-vote" if commissioners in fact represent only their residency districts). With this understanding of the facts, the Russell County Commission's 1979 reallocation of authority over road operations from individual commissioners to an appointed county engineer did not result in the transfer of authority from an official accountable to county voters at large to an official responsible to that same constituency, but rather from an official accountable to only one district in the county to an official responsible to the county at large. Before the change, power over road operations for a district was vested in an official accountable only to the voters of that residency district. After the change, road operations resided in an official accountable to all voters of the county at large. Based on the hypothetical given in the majority opinion, and restated above, the potential for discrimination is evident.

III.

I have related how I disagree with the majority's assessment of the facts behind the claim against the Russell County Commissioner. My disagreement is much broader, however. The majority writes "that reallocations of authority will generally be held to affect voting in a manner sufficient to subject them to preclearance under section 5 where they effect a significant relative change in the powers exercised by governmental officials elected by, or responsible to, *substantially different constituencies of voters.*" *Ante* at 19 [A-18-19] (emphasis added). Although the majority says that it is not positing a "general theory," it quickly adds that it is "unlikely" that § 5 coverage could be found under any other circumstances. *Id.* at 20 [A-19]. To the extent the majority is suggesting, though indirectly, that § 5 coverage could only be found where there are "substantially different constituencies of voters," I must respectfully disagree.

A.

I fully appreciate, and indeed share, the majority's concern that § 5 should not be expanded to reach the "most" 'ordinary or routine . . . modification[s] of the duties or authority of elected officials.' ' Ante at 25, quoting *Hardy v. Wallace*, 603 F. Supp. 174, 178 (N.D. Ala. 1985). However, I think that, in an effort to address this concern, the majority goes too far in its attempt to cabin the reach of § 5's coverage of reallocations of authority. It is one thing to find that a reallocation of authority involving a change in constituencies *has* a potential for discrimination. It is, however, quite a different matter to conclude that a reallocation can have a potential for discrimination *only if* there has been a change in constituencies. The first conclusion can be drawn from only one instance. The second conclusion, however, which is a universal negative inference, can only be drawn after a long empirical study. The record now before the court not only fails to support the second conclusion, it, if anything, requires a contrary conclusion.

In formulating its suggestion, the majority relies on four cases: *Robinson v. Alabama State Dep't of Education*, 652 F.Supp. 484 (M.D. Ala. 1987) (three-judge court); *Hardy v. Wallace*, 603 F.Supp. 174 (N.D. Ala. 1985) (three-judge court); *County Council of Sumter County v. United States*, 555 F.Supp. 694 (D.D.C. 1983) (three-judge court); and *Horry County v. United States*, 449 F.Supp. 990 (D.D.C. 1978) (three-judge court). The majority's reliance is misplaced for two reasons. First of all, none of these cases purports to say that a reallocation of authority can have a potential for discrimination *only if* there is a change in constituencies. Indeed, in *Horry*, the district court found to be contrary. There, the District of Columbia court's conclusion that the change "reallocates governmental powers among elected officials vote upon by different constituencies" was an "alternate reason" for finding that the change has the potential to discriminate. 449 F.Supp. at 995. The court also found that "state enactments which change a present method of electing public officials and enactments which result in electing public officials who were formally appointed" have the potential to discriminate. *Id.* See also *Robinson*, 652 F.Supp. at 486 (change covered by § 5 because it "changed the *means* by which

the board members who governed city schools were selected;" from a system of direct election by county voters to a system of appointment by the city counsel) (emphasis in original).

Second, with its suggestion, the majority is making a *factual* not a *legal* conclusion. It is attempting to suggest how reallocations of authority work in all situations. These four cases alone cannot support this empirical conclusion. In fact, I think that there is compelling evidence to the contrary. The Department of Justice — which is charged with the duty of determining whether a change relating to voting has a discriminatory purpose or effect and which has first-hand, day-to-day, experience in assessing whether a change is discriminatory — has expressly declined to adopt a rule regarding when reallocations of authority are covered under § 5. The Department states that "we do not believe that a sufficiently clear principle has yet emerged." 52 Fed. Reg. 486, 488 (Jan. 6, 1987). The Department's position regarding whether a rule can be formulated reflects agency policy and experience, which, if not entitled to deference from this court, should be considered highly instructive.

B.

I think that in modern-day voting rights cases such as this one, where racial discrimination will more than likely not show itself in the blatant forms of the past but instead will be subtle and sophisticated, a three-judge court should eschew generalities and instead should engage in a searching and detailed inquiry into the facts so as to ferret out even the most hidden forms of discrimination. The majority criticizes my approach by saying that I "would resolve the recurrent problem of fixing an outer boundary on the scope of section 5 by automatically expanding, where in doubt." *Ante* at 31 [A-26] n. 21. "A line must be drawn," the majority continues, "if section 5 is not to be stretched beyond the point of reason and beyond its legitimate purposes." *Id.* By suggesting that we not try to formulate generalities, I am not suggesting that § 5 be automatically expanded where in doubt. To the contrary, I am saying that there should be nothing automatic about § 5 at all, and each case should be carefully considered without unnecessar-

ily confining generalities.⁹ I think that a line not only need not be drawn, but should not be if § 5 is to be flexible enough to meet and successfully combat racial discrimination in voting in all its modern-day subtle forms.

But if a line must be drawn, or a principle suggested, as the majority would have it to prevent § 5 from being stretched beyond its legitimate purposes, then, for the following reasons, I think it is sufficient that the plaintiffs show, as they have done in this case, that the reallocations of authority resulted in the black citizens of each county having less direct control over the "traditionally fundamental duties" of county government. In deciding whether a change has potential for discrimination, a three-judge court must determine, first, whether the change is related to voting and, if so, second, whether the change has the potential for discrimination. If the change does not relate to voting, that is, is not a "standard, practice or procedure with respect to voting," 42 U.S.C.A. § 1973c, then it does not fall within § 5's coverage. I think that the first issue is satisfied under those unusual circumstances where there has been a *significant* and *fundamental* change in the nature of the duties traditionally exercised by elected officials. I think, however, that the burden necessary to satisfy the second issue should be very light. After all, the issue is whether the change has the *potential* for discrimination, not whether it *actually* discriminates. How a change, in fact, affected the political influence of various racial groups in a jurisdiction — and, more specifically, whether the change resulted in relative changes in powers exercised by governmental officials elected by, or responsible to, substantially different constituencies of voters, or whether the change discriminated in other ways against black voters — should be left to the microscopic analysis of the Attor-

9. The majority could have reached the same conclusions it did without suggesting the drawing of any line. It could have simply stated that as to the claim against Russell County the plaintiffs have not shown how there was a change in the powers exercised by governmental officials elected by, or responsible to, substantially different constituencies of voters, and that they have not shown any other potentially discriminatory effect. As to the Etowah County Commission's road fund resolution, the majority could simply have stated, as did the court in *Horry, Sumter, Hardy, and Robinson*, that there was such a change.

ney General and the District of Columbia District Court. This approach, which by definition would not reach the "most 'ordinary or routine . . . modification[s] of the duties or authority of elected officials,' " *ante* at 25, *quoting Hardy*, 603 F. Supp. at 178, would be flexible enough to help assure that those charged with enforcing § 5 would readily reach and stamp out racially discriminatory voting schemes and practices in all their forms, both the blatant and the subtle.

This approach is in line with the instructions of the Supreme Court that the question for a three-judge court confronting a preclearance issue "is not whether the provision is in fact innocuous and likely to be approved, but whether it has a *potential* for discrimination." *Dougherty County v. White*, 439 U.S. 32, 42, 99 S.Ct. 368, 374 (1978) (emphasis in original). The approval requirements of § 5 should be given "the broadest possible scope," to reach any enactment which alters the election law of a covered jurisdiction "in even a minor way." *Allen v. State Board of Elections*, 393 U.S. 544, 566, 89 S.Ct. 817, 832 (1969).

C.

I think that, to the extent a three-judge court like ours, after finding that a change relates to voting, delves in detail into the disputed facts to conclude that a change does *not* affect black citizenry, it exceeds its jurisdiction. The majority correctly observes that "in deciding the coverage issue 'it is not our province . . . to determine whether the changes at issue in this case in fact resulted in impairment of the right to vote, or whether they were intended to have that effect. . . . Our inquiry is limited to whether the challenged alteration has the *potential* for discrimination.' " *Ante* at 12 [A-8], *quoting NAACP v. Hampton County Election Comm'n*, 470 U.S. 166, 181, 105 S.Ct. 1128, 1137 (1985) (emphasis in original).

The majority, I believe, nevertheless does what the three-judge court did in the case reviewed by the Supreme Court in *Perkins v. Matthews*, 400 U.S. 379, 91 S.Ct. 431 (1971). There, confronted with a § 5 preclearance claim, the district court proceeded to find that several changes by the City of Clanton, Mississippi — an annexation, a change in polling places, and a change from wards to at-large election of city representatives — had no discrimina-

tory effect. The Supreme Court responded that the district court had exceeded its authority, and infringed on "what Congress expressly reserved for consideration by the District Court for the District of Columbia or the Attorney General." *Id.* at 385, 91 S.Ct. at 435.

Similarly, the majority, while claiming that it is assaying only the potential for discrimination, makes expressed findings with regard to the Etowah County Commission's common fund resolution's effect on the black voters in the county. It does the same with regard to the Russell County Commission when it concludes that the change "effected no significant change in the influence wielded by the voters of any district." *Ante* at 23 [A-22]. And with even more clarity and specificity, Judge Hobbs writes in his concurring opinion that

In Russell County . . . the administrative change was adopted many years before blacks sought a place on the governing body and was adopted to eliminate a practice that had proved inefficient and conducive to abuses. Indeed, the practice in Russell County eventually resulted in a criminal indictment of one of the commissioners.

Ante at 2 [A-30]. I fail to see any real difference between the issues reached, and indeed resolved, by the majority with the above comments and the issues which the Attorney General or the District of Columbia District Court reach and resolve each time a challenged reallocation of authority is submitted for preclearance.¹⁰

In my view, as long as the Etowah County Commission's common fund resolution can be reasonably viewed, whether true or not, as part of a larger scheme to strip the black commissioner and the other new commissioner of the authority traditionally

10. I think that the majority may well be correct on the present record in its ultimate conclusions about the claim against Russell County. But the fact that a change is likely to be precleared is not a basis for finding that it has no potential for discrimination and is not subject to § 5. See *Dougherty County Board of Education v. White*, 439 U.S. 32, 42, 99 S.Ct. 368, 374 (1978) ("the question is not whether the provision is in fact innocuous and likely to be approved, but whether it has a *potential* for discrimination") (emphasis in original).

exercised by road commissioners, then I think we should order that the resolution be subjected to scrutiny by the Attorney General or the District of Columbia District Court before it can be continued in effect. And, similarly, I believe that as long as the change made by the Russell County Commission could be viewed as giving black voters less direct control in the political process, then it should be subject to the same scrutiny.

IV.

In conclusion, I would add that, since the passage of the Voting Rights Act in 1965, county commissions across Alabama have either voluntarily or involuntarily opened themselves up to more black influence as to who can serve as a county commissioner. It remains to be seen, however, whether those elected by these newly influential black voters will share in governance to the same extent as their white counterparts do today and have in the past. As the Supreme Court has recognized, significant and fundamental changes in how these county commissions have traditionally governed themselves could frustrate or impede the efforts of blacks to achieve a fair and equal opportunity to participate in the political process. *See McCain v. Lybrand*, 465 U.S. 236, 250 n.17, 104 S.Ct. 1037, 1046 n.17 (1984). The Voting Rights Act, and in particular § 5 of the Act, was specifically designed both to remove such impediments as expeditiously as possible and to prevent them from even ever arising. I do not think that the opinion issued by the majority today sufficiently serves this purpose.

Done, this 1st day of August, 1990.

/s/ Myron H. Thompson

MYRON H. THOMPSON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

| | | |
|-------------------------------|---|----------------|
| ED PETER MACK, |) | [Filed |
| NATHANIEL GOSHA, III, |) | Aug. 21, 1990] |
| and LAWRENCE C. PRESLEY, |) | |
| individually and on behalf |) | |
| of others similarly situated, |) | |
| |) | |
| Plaintiffs, |) | |
| |) | CIVIL ACTION |
| vs. |) | NO. 89-T-459-E |
| |) | |
| RUSSELL COUNTY COMMISSION |) | |
| and |) | |
| ETOWAH COUNTY COMMISSION, |) | |
| |) | |
| Defendants. |) | |

ORDER

Before JOHNSON, Circuit Judge, HOBBS, Chief District Judge,
and THOMPSON, District JUDGE.

JOHNSON, Circuit Judge:

Plaintiffs' motion to alter or amend the judgment entered in
this case on August 1, 1990 is denied.

Russell County

The plaintiffs argue that this Court erred by using the 1979 at-large residency-district election system as the benchmark in determining whether Russell County's change to a unit system affected voting. They assert that the Court should have used the 1985 single-member district election system as the benchmark for measuring the 1979 change because the Department of Justice pre-cleared the 1985 system. This argument is unpersuasive because the change to a unit system took place in 1979, well before the 1985 change to single-member districts. In 1979, the individual

commissioners were elected by, and responsible to, all voters in the county. Transfer of authority over road repairs to the county engineer, an official appointed by and directly responsible to the commission, a body also elected by and politically responsible to all of the voters of the county, effected no significant change in the influence of voters from any district. The later change to a single-member district system does not alter the conclusion that the 1979 change to a unit system did not affect voting.

Iowa County

The plaintiffs challenge the Court's finding that both before and after the change to a common fund system the commission as a whole held the power to allocate funds among various districts. The plaintiffs cite no evidence tending to undermine this conclusion.

Jurisdiction

Finally, the plaintiffs assert that the Court exceeded its jurisdiction by denying plaintiffs' request for an injunction because the Department of Justice has requested that the challenged changes be submitted for preclearance. This argument is meritless; this Court's mandate is to determine whether the challenged changes are covered by section 5, and relief is inappropriate after a determination that the changes are not covered by section 5. *See McCain v. Lybrand*, 465 U.S. 236, 250 n.17 (1984); 42 U.S.C.A. § 1973c.

It is so ordered.

This 21st day of August, 1990.

/s/ Frank M. Johnson, Jr.

Frank M. Johnson, Jr.
United States Circuit Judge

/s/ Truman M. Hobbs

Truman M. Hobbs
United States Chief District Judge

Myron H. Thompson
United States District Judge

THOMPSON, J., dissenting:

I agree with the plaintiffs to the extent that they argue that, in determining whether a change in voting has the potential for discrimination, a court should take into consideration the present circumstances. I do not think a court should close its eyes to the present-day effects of a voting practice or procedure. After all, "Section 5 is . . . concerned . . . with the *reality* of changed practices as they affect Negro voters." *Georgia v. United States*, 411 U.S. 526, 531, 93 S.Ct. 1702, 1706 (1973) (emphasis added). See also 28 C.F.R. § 51.54(b)(1) ("In determining whether a submitted change is retrogressive the Attorney General will normally compare the submitted change to the voting practice or procedure *in effect at the time of the submission*") (emphasis added); 28 C.F.R. § 51.54(b)(2) ("The Attorney General will make the comparison based on the conditions *existing at the time of the submission*") (emphasis added).

DONE, this the 21st day of August, 1990.

/s/ Myron H. Thompson

UNITED STATES DISTRICT JUDGE

SECTION 5 OF THE VOTING RIGHTS ACT

§ 1973c. Alteration of voting qualifications and procedures; action by State or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court appeal to Supreme Court

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) [42 USCS § 1973b(a)] based upon determinations made under the first sentence of section 4(b) [42 USCS § 1973b(b)] are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) [42 USCS § 1973b(a)] based upon determinations made under the second sentence of section 4(b) [42 USCS § 1973b(b)] are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) [42 USCS § 1973b(a)] based upon determinations made under the third sentence of section 4(b) [42 USCS § 1973b(b)] are in effect shall enact to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) [42 USCS § 1973b(f)(2)], and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice,

or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code [28 USCS § 2284] and any appeal shall lie to the Supreme Court.

(Aug. 6, 1965, P. L. 89-110, Title I, § 5, 79 Stat. 439; June 22, 1970, P. L. 91-285, §§ 2, 5, 84 Stat. 314, 315; Aug. 6, 1975, P. L. 94-73, Title II, §§ 204, 206, Title IV, § 405, 89 Stat. 402, 404.)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

ED PETER MACK; NATHANIEL
GOSHA, III; and LAWRENCE C.
PRESLEY, individually and on
behalf of others similarly situated,

Plaintiffs,

vs.

RUSSELL COUNTY COMMISSION
and
ETOWAH COUNTY COMMISSION,

Defendants.

[Filed
Aug. 27, 1990]

CV 89-T-459-E

Notice of Appeal

LAWRENCE C. PRESLEY hereby appeals to the Supreme Court of the United States from the Order denying an injunction (entered on 1 August 1990) and the Order denying his motion to alter or amend the judgment (entered on 21 August 1990) with regard to the ETOWAH COUNTY COMMISSION. This appeal is taken under 28 USC § 1253.

Submitted by,

James U. Blacksher
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Leslie M. Proll
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300 21st Street North
Birmingham, AL 35203
205/322-1100

/s/ Edward Still

Edward Still
714 South 29th Street
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AN ACT

Relating to Russell County: to provide that all functions, duties and responsibilities for the construction, maintenance and repair of public roads, highways, bridges and ferries in the county shall be vested in the county engineer and shall be maintained on the basis of the county as a whole, without regard to district or beat lines, and to prescribe certain duties for the county engineer.

Be It Enacted by the Legislature of Alabama:

Section 1. All functions, duties and responsibilities for the construction, maintenance and repair of public roads, highways, bridges and ferries in Russell County are hereby vested in the county engineer, who shall, insofar as possible, construct and maintain such roads, highways, bridges and ferries on the basis of the county as a whole or as a unit, without regard to district or beat lines.

Section 2. The county engineer shall assume the following duties, but shall not be limited to such duties:

(1) to employ, supervise and direct all such assistants as are necessary properly to maintain and construct the public roads, highways, bridges, and ferries of Russell County, and he shall have authority to prescribe their duties and to discharge said employees for cause, or when not needed; (2) to perform such engineering and surveying service as may be required, and to prepare and maintain the necessary maps and records; (3) to maintain the necessary accounting records to reflect the cost of the county highway system; (4) to build, or construct new roads, or change old roads, upon the order of the county commission; (5) insofar as is feasible to construct and maintain all country roads on the basis of the county as a whole or as a unit.

Section 2. The provisions of this act are severable. If any part of this act is declared invalid or unconstitutional, such declaration shall not affect the part which remains.

Section 3. All laws or parts of laws which conflict with this act are hereby repealed.

A-49

Section 4. This act shall become effective immediately upon its passage and approval by the Governor, or upon its otherwise becoming a law.

Approved July 30, 1979

Time: 6:00 P.M.

NOV 21 1990

JOSEPH F. SPANIOL, JR.
CLERK

No. 90-712

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

ED PETER MACK and NATHANIEL GOSHA, III,
individually and on behalf of others similarly situated,

Appellants,

vs.

RUSSELL COUNTY COMMISSION and
ETOWAH COUNTY COMMISSION,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

MOTION TO AFFIRM/ALTERNATIVE MOTION TO DISMISS
OF APPELLEE, RUSSELL COUNTY COMMISSION

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October 1990

No. 90-712

**IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990**

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individually and on behalf of others similarly situated,**

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**Attorneys for Appellee
Russell County Commission**

October 1990

Motion To Affirm/Alternative Motion To Dismiss

COMES NOW Appellee, Russell County Commission, and moves the Court to affirm the court below in its ruling that the change of the Russell County Commission in 1979 from a district or semi-district form of operating its road department to a Unit System under the control of the county engineer was not subject to the provisions of Section 5 of the Voting Rights Act, alternatively to dismiss. As grounds for said motion, Appellee states as follows:

1. Those commissioners supervising the various road districts prior to 1979 did not act autonomously, but subordinate to and in aid of the entire ccommission.

2. The duties performed by such commissioners were purely ministerial under Alabama law and subordinate to the county commission.

3. Such commissioners were elected from the county at large, rather than from individual districts.

4. The powers of the county commission to appoint a county engineer and implement a Unit System predate the Voting Rights Act of 1964.

WHEREFORE, PREMISES CONSIDERED, Appellee moves the Court to affirm the court below in its ruling that the change of the Russell County Commission in 1979 from a district or semi-district form of operating its road department to a Unit System under the supervision of the county engineer was not subject to the provisions of Section 5 of the Voting Rights Act of, alternatively, to dismiss this appeal.

Question Presented

Whether a ministerial function performed by an officer answerable to the county commission and elected from the county at large may be transferred to an employee appointed by the same county commission without preclearance under Section 5 of the Voting Rights Act.

Parties In Court Below

The parties in the court below at the time of the judgment were plaintiffs Ed Peter Mack, Nathaniel Gosha, III, Lawrence C. Presley, and defendants Russell County Commission and Etowah County Commission. This appeal relates only to the claim of Mack and Gosha against the Russell County Commission. Lawrence C. Presley, a resident of Etowah County, has informed the Clerk that he has no interest in this appeal. See No. 90-711.

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Statement of the Case

Appellee totally rejects Statement of the Case submitted by Appellants. Appellants are traveling on a totally false assumption that prior to 1979 each commissioner had complete control of a virtually autonomous district, including a portion of the budget (page 2 of Appellants' Statement of the Case). Based on that assumption, Appellants make the following statement in their Argument:

" . . . Each member controlled a portion of the budget which he or she could use to bargain with other commissioners for constituent services of all sorts. . . .

"While this case is not about patronage, it is about a similar form of political power: the ability of commissioners to act with relative autonomy. . . ." (Appellant Brief, p. 7)

Prior to 1979, the road department of Russell County operated under a district or semi-district system, that is, with three of the five county commissioners (those commissioners residing in districts outside Phenix City) being personally involved in supervising actual maintenance of county roads in his particular district, i.e. the rural districts outside the city limits.¹ The districts were approximately the same size and contained approximately the same miles of rural roads. (Deposition of John W. Belk, page 20.) The road funds were never divided and the three shops were included in a single road budget always under the control of the county commission. (See pages 6, 7, 9, 10, 12, and 15 of the Deposition of John W. Belk).

During the latter part of 1978 and early 1979, a grand jury of Russell County conducted an investigation involving misuse of county equipment and personnel. As a result, one

¹The city streets and roads are maintained from separate city and state funds under control of the cities. In fact, 20% of Russell County's share of the State gasoline tax by general and local law goes to the municipalities. (Exhibit 3 to this defendant's Motion for Summary Judgment). Counties may, with consent of the city government, work on city streets. (§23-1-86, Code of Alabama, 1975).

of the commissioners was indicted by the grand jury and a recommendation was made that the county adopt what is commonly known as the "Unit System". (Deposition of Charles Adams, page 13; and Deposition of John W. Belk, page 8). Under the Unit System, the county road department is operated without regard to district lines by the county engineer, a professional appointed by and responsible to the county commission. See § 11-6-1, **Code of Alabama**, 1975. The duties of the county engineer are specified by state law (§ 11-6-3 of the **Code**). Such has been the law of the state of Alabama since 1939. (Title 12, § 69, **Code of Alabama**, 1940) It is the system recommended by the State Highway Department and other authorities. (See Deposition of Charles Adams, page 14; The Alabama Law Institute's Handbook for County Commissioners; and a study published by Professor Lansford C. Bell of Auburn University, Department of Civil Engineering, in April 1979).²

Following the grand jury's investigation, indictment and recommendation, the legislative representative, Mr. Charles Adams, met with the county commission to apply pressure to adopt the Unit System for operating the county road department. During a meeting on May 18, 1979, the county commission passed a resolution reorganizing the road department under the Unit System "effective immediately". (Page 3 of District Court Order, A-3 of Appellant's Brief).

Following the meeting of the county commission, Mr. Adams introduced House Bill 977, which later became Act No. 79-652. This bill was introduced by Mr. Adams to **prevent** the county commission from deciding at a later date to reverse its resolution of May 18, 1979. (Page 9 of Deposition of Adams).

As a result of a consent decree entered March 17, 1986, in **Sumbry v. Russell County**, CV-84-T-1386-E, the county was redistricted into seven commission districts, three of which have a predominantly black population. Although past discrimination, based on unlawful dilution of black voting

²A copy of the pertinent portion of Professor Bell's recommendation was attached as a part of Exhibit 1 to Russell County's response to the Justice Department in the Court below.

strength was alleged, no such finding was entered. Prior to Sumbry, the five commissioners, while residing in individual districts, were elected from the county "at large". Sumbry divided the county into seven districts and each commissioner is now elected by district. Two of the commissioners Mack and Gosha, (plaintiffs in this case) are black and were elected in 1986.³

³Districts 4 and 5 respectively. District 4 has 1.3 total miles of county-maintained roads or .2%; District 5 has 73.92 miles of county-maintained roads or 13.8%. (Exhibit 3.B. to defendant's Motion for Summary Judgment).

Summary of Argument

Prior to 1979, three county commissioners of Russell County, elected at large, supervised the maintenance of the county roads. Such supervision, however, was done under the control of the county commission and subordinate to it. Under Alabama law, the county commission (composed of five members) retained the control of such roads and one supervising the maintenance and repair was subordinate to such control and exercised a ministerial function.

Transfer of responsibility for conducting a ministerial function by a local government is not subject to preclearance under Section 5 of the Voting Rights Act. To hold otherwise would virtually strangle every local government subject to the Voting Rights Act.

Argument

I. MINISTERIAL FUNCTION

Appellants have artfully twisted every fact, in an attempt to show that the various districts of Russell County were operated prior to 1979 virtually autonomously, with the commissioner of each district totally in charge with his own budget and the roads and bridges of his district. The attempt by Appellants is purely and simply to divide the county road budget into seven small equal portions and have each one of the commissioners an autonomous officer holding legislative and executive powers. In this way he could, in fact, provide services and conduct "horse trading" with other members of the county commission to secure services. (p. 7 of Appellants' Brief).

From a factual standpoint, this semi or "virtual" autonomous power in the various districts by county commissioners has never been the state law of Alabama, nor has it been practiced in any county. Admittedly, many of the counties had a semi-district or actual district system, whereby a rural county commissioner in his particular district would exercise certain supervisory control over maintenance and repair of county roads in his district. This is an outgrowth of the rural, basically agricultural condition of Alabama in years past. On some occasions the counties were directed to operate under a district system by local law. However, even so, the Alabama Supreme Court has held that statutory duties and powers to supervise construction and maintenance of roads and bridges in a district were "administrative, and subordinate to and in aid of the entire commissioners court." See **Court of Commissioners of Pike Co. v. Johnson**, 229 Ala. 417, 157 So. 481 (1934). In fact, in that case the Supreme Court of Alabama specifically rejected the idea of a local law allowing autonomous or semi-autonomous districts:

"A careful study of the act of 1932, *supra*, leads us to the conclusion that there was no intention to transfer these governmental powers from the governing body of the county and vest them in

the commissioner of each district. Such construction would destroy the unity of county government, and set up several rival government units of one man each, which, with undefined powers, would lead to great confusion." 229 Ala. at 419.

By local act of 1936, the legislature created the office of road supervisor for Chilton County, with the power of appointment in the governor. The road supervisor was charged with the duty of "...supervising the construction, maintenance and repairing the public roads..." The supervisor was also required to be a civil engineer. Suit was filed over the question of whether the road supervisor's duties stripped the court of county commissioners of its statutory powers under §1347 of the **Code of Alabama**, 1923 (§ 23-1-80 of the 1975 **Code**). The Supreme Court held:

"This supervisor is required to be a civil engineer, and his duties and authority in nowise conflict with the general powers of the Court. He is in immediate charge of the construction, maintenance and repair of the roads, but his duties are **purely ministerial, and subordinate** to the court of county commissioners." (emphasis supplied)

Thompson v. Chilton County, 236 Ala. 142, 145, 181 So. 701 (1938).

Under the law of Alabama as it existed in 1923, in 1979, and this very day, the county commission alone exercises control over the roads and bridges of the county. The county commission alone exercises control over the budget process. § 11-8-3 of the **Code of Alabama**. The control exercised by a county engineer, whether by § 11-6-3 of the **Code**, or by virtue of Act No. 79-652, (A-48, Appellants' Brief) is purely ministerial. The functions exercised by a county commissioner under a district system or semi-district system were also purely ministerial. Those functions were simply the same as that carried out by the engineer, and at all times were subordinate to the control of the county commission. See § 23-1-80, **Code of Alabama**, 1975.

Prior to 1979 commissioners, in exercising supervision over maintenance in the three individual rural districts, did so subject and subordinate to the executive and legislative control of the county commission acting as a body. Substitution of a trained civil engineer over that function was no more than substituting one ministerial officer for another through the legislative function of the county commission as a body. The ordinary or routine legislative modification of duties or authority of officials "...probably are beyond the reach of Section 5, even given its broadest interpretation." **Hardy v. Wallace**, 603 F. Supp. 174, 179 (N.D. Ala. 1985).

II. APPLICATION OF LAW

Russell County's adoption of the Unit System was first by resolution of the county commission on May 18, 1979. Therefore, the subsequent act of the legislature of Alabama and its preclearance should not be the primary question. Also, it should be underscored that the authority of the county commission to adopt such a resolution existed long before the passage of the Voting Rights Act of 1964. The actual change did not involve any "voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting..." as required by the Voting Rights Act, Section 5, 42 U.S.C. 1973(c). At the time of adoption, the members of the county commission, although required to reside in individual districts, were elected by the county at large. The election procedure itself had been adopted by the United States District Court for the Middle District of Alabama. **Anthony, et al. v. Russell County, et al.**, Civil Action No. 961-E, under decree dated November 21, 1972. The claim that a commissioner represented a particular district in 1979 is inaccurate.

Prior to May 18, 1979, three of the commission districts were rural districts and contained all of the county roads. The other two districts were strictly municipal districts. It was the commissioners from the rural districts who supervised the road shops. On May 18, 1979, the county engineer took over the supervision of the county shops and personnel. Section 5 of the Voting Rights Act applies only to proposed

"changes in voting procedures". **Beers v. United States**, 425 U.S. 130 (1976). The preclearance procedures mandated by Section 5 of the Voting Rights Act "focus entirely on changes in the election process." **McClain v. Lybrand**, 475 U.S. 236 (1984).

The lower court based its ruling on the fact that the three rural commissioners in the pre-1979 operation were elected at large, although the court noted that the county commission itself still retained the control over the roads and bridges and maintenance thereof under § 23-1-80 of the Code. However, Appellees respectfully submit that as a ministerial function under Alabama law, and considering the fact that supervision is subordinate to the control of the county commission, regardless of who was selected by the county to exercise that supervisory power over the day-to-day maintenance, change in that function would not be subject to Section 5 preclearance.

Section 5 preclearance was aimed at the election process, the voting process, to protect the rights of minorities, and while Appellee recognizes that this Court has stated that one must look at the potential for discrimination, we respectfully submit that it was never intended by Congress that the change of a ministerial function from a non-professional to a professional on the local government staff be subject to preclearance. The three commissioners who exercised supervisory powers prior to 1979 did so at the sufferance and with the consent of the commission as a whole. They were, in effect, appointed by the commission as a whole. Revoking such appointment, as the commission did on May 18, 1979, did not affect the voting rights, or have the potential for affecting the voting rights of any person in the county. Commissioners were then, and are now, part-time officers. There was no decrease in pay or authority under Alabama law. When one further considers the fact that the commission districts, which were mere residency districts in 1979, have been changed and increased in number by the U.S. District Court in **Sumbry** (all precleared) and are now election districts, it boggles the mind to conceive how one would unscramble the 1979 egg.

Conclusion

If the court were to rule that a change in ministerial functions, or appointment of persons to perform those functions, by a local government was subject to Section 5 pre-clearance, it would amount to a virtual strangling of county government. Of course, Appellants would have this Court do more. They would have the Court divide the county into a loose confederation of seven virtually autonomous election districts. Such has never been authorized by state law, and was never intended by Congress.

For these and other reasons, Appellee respectfully requests the Court to dismiss the appeal or, alternatively, to affirm.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1990

LAWRENCE C. PRESLEY, ETC., APPELLANT

v.

ETOWAH COUNTY COMMISSION, ET AL.

ED PETER MACK, ET AL., APPELLANTS

v.

RUSSELL COUNTY COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE**

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QUESTIONS PRESENTED

The ultimate question presented in both cases is whether a transfer of decisionmaking authority from one elected official or set of officials to another official or set of officials is a "change with respect to voting" covered by Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, regardless of whether the officials serve the same or different voting constituencies and regardless of whether the transferred authority is more or less important than other duties of the office.

1. In No. 90-711, the specific question is whether a county commission's decision to transfer authority to determine road work priorities from individual commissioners elected from single-member districts to the entire commission is a change "with respect to voting" under Section 5.

2. In No. 90-712, the specific question is whether a State's transfer of road work authority from county commissioners elected at large from residency districts to a county engineer appointed by the commission is a change "with respect to voting" under Section 5.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-711

LAWRENCE C. PRESLEY, ETC., APPELLANT

v.

ETOWAH COUNTY COMMISSION, ET AL.

No. 90-712

ED PETER MACK, ET AL., APPELLANTS

v.

RUSSELL COUNTY COMMISSION, ET AL.

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA*

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE**

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States in these cases.

STATEMENT

1. On November 1, 1964 (the date Section 5 of the Voting Rights Act of 1965 became applicable to appellees, see 42 U.S.C. 1973b(b)), the Etowah County Commission consisted of five members: four

commissioners elected at large but required to reside in separate "residency districts," and a chairman elected at large. J.S. App. A4.¹ The four commissioners each exercised complete control over a road shop, crew, and equipment in their residency district. *Ibid.* Road funds were allocated to each district based on projected need. *Ibid.* The four "road commissioners" individually determined work priorities in their own districts. *Ibid.*

In 1986, the Commission entered into a consent decree resolving litigation under Section 2 of the Voting Rights Act. J.S. App. A4-A5. The decree expanded the Commission to six members, all of whom eventually would be elected from single-member districts. *Id.* at A5. Two commissioners were elected from single-member districts in December 1986. Appellant Presley, the first black commissioner of Etowah County in recent history, is one of these two. *Ibid.* Under the decree, two of the at-large holdovers ran from districts and were elected in 1988, and two were to run from districts in 1990. *Ibid.*

The consent decree specified that the commissioners elected in 1986 were to have the same duties as the four holdovers. J.S. App. A5. In August 1987, however, the Commission passed a resolution providing that each of the four holdovers would continue to exercise authority over road operations in their districts. *Ibid.* The resolution further provided that the "old four" would oversee road work throughout Etowah County. *Id.* at A5-A6. The resolution assigned non-road duties to the two new commissioners.

¹ The district court's opinion is reproduced in the appendices to the Jurisdictional Statements in both No. 90-711 and No. 90-712; references herein to "J.S. App." may be found in the appendix to either filing.

Id. at A6. The effect of the resolution was to strip the two new commissioners of any supervisory authority over road operations. Not surprisingly, this "road supervision" resolution was passed by a vote of four to two, over the opposition of the two new commissioners. *Id.* at A5.

On the same day, the Commission adopted a second resolution by an identical vote of four to two. J.S. App. A6-A7. This resolution abolished the practice of allocating road funds to districts. Instead, the resolution provided that road funds would be retained in a common fund for use without regard to district lines. *Id.* at A6. The effect of this "common fund" resolution was to eliminate the authority of individual commissioners to determine funding priorities in their districts. *Id.* at A7.

2. On November 1, 1964, the Russell County Commission consisted of three members elected at large from residency districts. J.S. App. A2. In 1972, as a result of a court order to comply with the one person, one vote rule, the Commission was expanded to five members. A fourth residency district consisting of Phenix City was created, and two commissioners were required to reside there. *Ibid.*

Under this system, each of the three rural commissioners had authority over his own road shop. J.S. App. A2. (Municipal roads in Phenix City generally are not funded or maintained by the county. See *id.* at A2 n.2.) The three rural commissioners each set road work priorities, bought equipment, and hired and managed personnel within their own districts. *Id.* at A2-A3. Each commissioner also approved funding for routine work. *Id.* at A3. Funding for new or major construction, however, required Commission approval. *Id.* at A3 n.3.

A county engineer, appointed by the Commission, assisted the road commissioners in carrying out their responsibilities. *Id.* at A3.

After an investigation uncovered corruption in Russell County's road operations, the Alabama legislature enacted in 1979 a statute transferring all responsibility for road work to the county engineer. J.S. App. A3. The statute requires the engineer to perform road work without regard to district lines, thereby establishing what is known as a "unit system." *Ibid.*

In 1985, the Commission entered into a consent decree to resolve litigation under Section 2 of the Voting Rights Act. J.S. App. A4. Under the decree, the Commission was expanded to seven members, each elected from a single-member district. *Ibid.* Appellants Mack and Gosha were elected to office under this system in 1986, and became the first two black commissioners in recent history. *Ibid.*

3. In 1989, appellants filed suit in federal district court alleging that the conduct of road operations in Etowah and Russell Counties violated previous court orders, the Fourteenth and Fifteenth Amendments, Title VI of the Civil Rights Act of 1964, and Section 2 of the Voting Rights Act. J.S. App. A7. Thereafter, appellants amended their complaint to allege that Russell County's failure to preclear its transfer of road authority to the county engineer, and Etowah County's failure to preclear the road supervision and common fund resolutions, violated Section 5 of the Voting Rights Act. *Ibid.* A three-judge court was convened to consider the Section 5 claims. J.S. App. A7-A8.

The court held that transfers of authority are subject to Section 5 preclearance when they "effect a significant relative change in the powers exercised

by governmental officials elected by, or responsible to, substantially different constituencies of voters." J.S. App. A13-A14. Since minority groups often have different levels of voting strength in different constituencies, the court explained, a transfer of authority from an official elected by one constituency to an official elected by another may have a potential for discrimination. *Ibid.* Such a potential is unlikely to exist, the court thought, when the officials are elected by the same constituency. *Ibid.* Even when officials with different constituencies are involved, the court added, "minor or inconsequential" transfers of authority do not have a "significant potential impact on voting rights." *Ibid.*

Applying these principles, the court concluded that Russell County's transfer of road supervision authority from the individual commissioners to the county engineer was not a change covered by Section 5, because both the commissioners and the engineer ultimately were answerable to the same constituency—the entire Russell County electorate. J.S. App. A16-A18. Although individual commissioners were required to reside in a particular district, the court explained, they "were elected by, and thus politically responsible to, all the voters of Russell County." *Id.* at A16. Similarly, the county engineer, although appointed, is responsible to the commission, and that body is responsible to all county voters. *Id.* at A16-A17.

The court also concluded that Etowah County's common fund resolution did not require preclearance. The court acknowledged that the common fund resolution transferred authority between officials with different constituencies. Before enactment of the resolution, individual commissioners elected from, or facing election from, single-member districts

could determine priorities for road repair in their own districts; afterwards, the entire commission had this authority. J.S. App. A18-A19. The court nonetheless concluded that this change did not affect voting, since the power to set internal priorities was “minor and inconsequential” compared to the entire commission’s authority, both before and after the resolution, to determine the amount of money to be allocated to each district. *Id.* at A19.

In contrast, the district court held that Etowah County’s road supervision resolution was covered by Section 5. J.S. App. A20-A21. The court concluded that “the potential for discrimination posed by this change is blatant and obvious.” *Id.* at A20. The court explained that “[w]hereas before 1987 all the voters of Etowah County participated in choosing the commissioners responsible for road management, the 1987 resolution stripped the voters in [two] districts * * * of any electoral influence over such commissioners.” *Ibid.* Thus, “[a]uthority over the most important aspect of county governance was shifted from officials responsible to the entire county to officials (albeit the same individuals) responsible to only two thirds of the county voters.”² *Id.* at A20-A21.

Judge Thompson concurred in part and dissented in part. He agreed with the majority that Etowah County’s road supervision resolution was subject to the preclearance requirement, but dissented from the court’s determination that the common fund resolution did not require preclearance. J.S. App. A27-A33. In concluding that the power to set internal priorities is comparatively insignificant, Judge

² Etowah County subsequently repealed the road supervision resolution, and has not cross-appealed. Mot. to Aff. 2 n.3.

Thompson said, the majority ignored the realities of road operations in Etowah County. *Id.* at A32. The allocation of funds among districts “has never been a bone of contention.” *Ibid.* Instead, a “commissioner’s real authority lies * * * in how those funds are used after they are allocated.” *Ibid.* In Judge Thompson’s view, “[t]he common fund resolution, and the road supervision resolution, working together, took this authority away from the two new commissioners and gave it exclusively to the four holdover commissioners.” *Ibid.*

Judge Thompson also dissented from the court’s conclusion that Russell County’s transfer of road authority from individual commissioners to the county engineer did not constitute a change affecting voting. J.S. App. A33-A35. According to Judge Thompson, the court’s holding ignored the possibility that the commissioners might have been more accountable to voters in their residency districts than to those outside their districts. *Id.* at A34. More fundamentally, Judge Thompson disagreed with the majority’s conclusion that transfers of authority are covered by Section 5 only when they occur between officials with different constituencies. J.S. App. A35-A36. The question whether there is a potential for discrimination, he thought, should not be decided on the basis of a rigid rule. *Id.* at A37-A38. If a limiting principle were required, Judge Thompson stated, he would find it sufficient for plaintiffs to show that “there has been a *significant* and *fundamental* change in the nature of the duties traditionally exercised by elected officials.” *Id.* at A38.

DISCUSSION

The central question presented by these related appeals is under what circumstances a change in the decisionmaking authority of an elected official or set of officials constitutes a change in a "standard, practice, or procedure with respect to voting" requiring preclearance under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. In exercising its responsibilities under Section 5, the Department of Justice has long treated certain transfers of decisionmaking authority as changes "with respect to voting."³ We have also taken that view in cases before this Court.⁴ At the same time, the United States has argued, and this Court has indicated, that not all relocations of authority are covered by Section 5. See *Rojas v. Victoria Indep. School Dist.*, Civ. A. No. V-87-16 (S.D. Tex. Mar. 29, 1988), summarily aff'd, 490 U.S. 1001 (1989). Thus far, no clear line has

³ For example, the Department has objected to the following transfers of decisionmaking authority: (1) Mobile, Alabama (March 2, 1976), involving assignment of specific administrative functions to each city commissioner; (2) Charleston, South Carolina (June 14, 1977), involving a transfer of taxing powers from the county legislative delegation to the county council; (3) Edgefield County, South Carolina (February 8, 1979), involving a transfer of substantial powers from the county legislative delegation to the county council; (4) Waycross, Georgia (February 6, 1988), involving changes in the power and duties of the mayor; and (5) San Patricio, Texas (May 7, 1990), involving the transfer of registration duties from the county clerk to the county assessor.

⁴ See Brief for the United States at 15-16, *City of Lockhart v. United States*, 460 U.S. 125 (1983); Brief for the United States at 21-27, *McCain v. Lybrand*, 465 U.S. 236 (1984); Brief for the United States at 8-10, *Rojas v. Victoria Indep. School Dist.*, 490 U.S. 1001 (1989).

emerged separating those transfers of authority that are subject to preclearance from those that are not.

The district court sought to draw such a line in this case by limiting the scope of Section 5 to transfers that involve a “significant relative change” in power between officials who are “elected by, or responsible to, substantially different constituencies of voters.” Pet. App. A13-A14. For the reasons set out below, we think the district court’s standard cannot be reconciled with Congress’s intention to subject to Section 5 review all changes affecting voting with a potential for discrimination. In any event, the question whether the district court applied the proper standard for determining whether a transfer of authority requires preclearance is a substantial and recurring one that merits this Court’s plenary consideration.⁵ Accordingly, the Court should note probable jurisdiction.

1. Section 5 of the Voting Rights Act of 1965 provides that certain States and political subdivisions, including appellees, may not implement “any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting” without first obtaining preclearance from the United States District Court for the District of Columbia or the Attorney General. 42 U.S.C. 1973c. To receive preclearance, a covered jurisdiction must show that a proposed change “does not have the purpose and

⁵ The question has arisen in *Robinson v. Alabama Dep’t of Educ.*, 652 F. Supp. 484 (M.D. Ala. 1987) (three-judge court); *Hardy v. Wallace*, 603 F. Supp. 174 (N.D. Ala. 1985) (three-judge court); *County Council v. United States*, 555 F. Supp. 694 (D.D.C. 1983) (three-judge court); and *Horry County v. United States*, 449 F. Supp. 990 (D.D.C. 1978) (three-judge court). In each case, the reallocation was held to be subject to the preclearance requirement.

will not have the effect of denying or abridging the right to vote on account of race, color, or [membership in a language minority group]." *Ibid.*

The procedural question whether a change is subject to preclearance is not the same as the substantive question whether the change should be precleared. In deciding the first question, a court may not inquire into whether the change has a discriminatory purpose or effect. *NAACP v. Hampton County Election Comm'n*, 470 U.S. 166, 181 (1985). Instead, the inquiry is limited to deciding whether the challenged alteration has the "potential for discrimination." *Ibid.* Moreover, a court may not exempt from preclearance changes that it views as insignificant. The plain language of the statute makes the preclearance requirement applicable to *any* change with respect to voting, no matter how small or minor. *Allen v. State Bd. of Elections*, 393 U.S. 544, 566 (1969). See *Hallstrom v. Tillamook County*, 110 S. Ct. 304, 309 (1989) (Courts "are not at liberty to create an exception where Congress has declined to do so.").

Congress intended Section 5 to be applied broadly. The Voting Rights Act defines the terms "vote" and "voting" to include "all action necessary to make a vote effective." 42 U.S.C. 1973l(c)(1). The scope of Section 5 is not limited to changes directly affecting the casting of a ballot. This Court has recognized that "[t]he right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot." *Allen v. State Bd. of Elections*, 393 U.S. at 569. See also *Georgia v. United States*, 411 U.S. 526, 534 (1973); *Perkins v. Matthews*, 400 U.S. 379, 390 (1971). Consistent with this understanding, the Court has held that a change from

single-member districts to at-large voting (*Allen*, 393 U.S. at 560-571), the introduction of numbered posts and staggered terms (*City of Lockhart v. United States*, 460 U.S. 125, 131-132 (1983)), reapportionments (*Georgia v. United States*, *supra*), and annexations (*Perkins v. Matthews*, *supra*) all are subject to preclearance. This Court has thus recognized that a "standard, practice, or procedure with respect to voting" is not limited to the mechanics of voting, but includes how the vote counts and what it is for. In short, the preclearance requirement applies to all changes that affect "the power of a citizen's vote." *Allen*, 393 U.S. at 569.

One type of change that can directly affect "the power of a citizen's vote" is a change in what the official the citizen votes for is authorized to do. For example, a change eliminating all of a county commission's power and making the body purely ceremonial would have the effect of changing the citizen's vote for county commissioners from something of significance to an empty gesture. To cite another example, suppose litigation under Section 2 of the Voting Rights Act resulted in changing the method of electing members of a school board from an at-large system to a single-member district system, and that minority group members then elected one or more officials to the school board for the first time. Suppose further that, immediately following the election, the State transferred taxing and budgetary authority from the school board to a county commission whose members are elected at large. Clearly, this change has the potential to interfere with the power of minority voters to elect the officials who make school funding decisions.

The Court has not yet had occasion to hold that changes in the powers of an elected body are changes

in a "standard, practice, or procedure with respect to voting" requiring preclearance under Section 5. 42 U.S.C. 1973c. The Court has held, however, that a change from a three-member body to a five-member body was a change requiring preclearance, because it changed the voting power of the individual members of the three-member body. *City of Lockhart v. United States*, 460 U.S. 125 (1983). As the Court explained in *Lockhart*, "[i]n moving from a three-member commission to a five-member council, [the city] has changed the nature of the seats at issue. * * * For example, [two of the old seats] now constitute 40% of the council, rather than 67% of the commission." *Id.* at 131. If diminishing the power of an individual *member* of an elected body by increasing the size of the body without changing its powers is a change requiring preclearance, it would seem to follow *a fortiori* that altering the power of the commission as a whole would also constitute a change affecting "the power of a citizen's vote." *Allen*, 393 U.S. at 569.⁶

As the above examples illustrate, when a State transfers decisionmaking authority from one body to another, there is a *potential* for discrimination against minority voters. Such transfers are therefore subject to preclearance under Section 5. Should the circumstances of a particular transfer of decisionmak-

⁶ In *McCain v. Lybrand*, 465 U.S. 236 (1984), state legislation changed the governing body of a county from an appointed commission to an elected council with increased legislative powers. The parties stipulated that this legislation incorporated changes with respect to voting, and the Court therefore was not required to address the issue. The Court nevertheless noted that "several changes are suggested," including "the basic reallocation of authority from the state legislative delegation to the Council." *Id.* at 250 n.17.

ing power be such that there is no *actual* discrimination, the change will be precleared.

2. The district court correctly recognized that transfers between officials with different voting constituencies can create the potential for discrimination, since "identifiable racial or ethnic groups of voters will often have different levels of voting strength in different constituencies." J.S. App. A14. The court concluded, however, that transfers between officials with the same constituency are so unlikely to discriminate against minority voters that preclearance is not required. *Ibid.*

The district court erred in concluding that transfers of authority between officials who serve the same constituency have no discriminatory potential. Suppose, in the school board example above, that the school board and the county commission both are elected at large by all residents of the county, but that single-shot voting is permitted in school board elections.⁷ If minority voters are able to concentrate their voting strength and elect a candidate they favor to the school board, and funding authority is then transferred to the county commission, the transfer is potentially discriminatory.

Our disagreement with the district court's "different constituency" rule is by no means academic. On at least two occasions, the Attorney General has objected to transfers of authority between officials serv-

⁷ Single-shot voting is possible where candidates compete for more than one vacancy. A minority group can increase the likelihood of electing a candidate it favors by voting only for him. If the rest of the electorate splits its vote among a number of candidates, the minority-favored candidate may win. See *City of Rome v. United States*, 446 U.S. 156, 184 n.19 (1980).

ing the same constituency. In one case (Mobile, Alabama, March 26, 1976), a three-member commission elected at large transferred administrative responsibilities exercised by the entire commission to individual members of the commission. Our investigation disclosed that the purpose of this transfer was to forestall any possibility of a change to single-member districts (on the ground that it would be inappropriate to permit one area of the city to elect an official with city-wide responsibility). In another case (San Patricio, Texas, May 7, 1990), the Attorney General objected when a county transferred the authority to register voters from the county clerk to the county tax assessor, both of whom are elected at-large by the entire county. Our investigation revealed that the purpose of the change was to retaliate against the county clerk for cooperating in a Section 5 review of an unrelated voting change. These objections further demonstrate that the district court's "different constituency" test too narrowly defines the circumstances under which preclearance should be required.

The district court's "different constituency" rule is also inconsistent with *Lockhart*. As discussed above, this Court held that the transfer of power from a three-member body to a five-member body was covered by Section 5, even though both bodies served the same voting constituency. See also *Horry County v. United States*, 449 F. Supp. 990, 993-995 (D.D.C. 1978) (three-judge court) (transfer of administrative functions from chairman elected at-large to administrator appointed by Council elected at-large is a covered change).

In addition, the district court's approach blurs the basic distinction between the procedural question whether a change must be submitted for preclearance and the substantive question whether the change

should be precleared. This Court's decision in *Perkins v. Matthews, supra*, illustrates the difference between the two inquiries. In *Perkins*, the district court held that a jurisdiction's annexation did not have to be precleared because blacks still constituted a majority of voters after the annexation. 400 U.S. at 385-386. Similarly, the court did not require the jurisdiction to preclear a change from single-member districts to at-large elections because blacks would retain the power to elect the candidates of their choice in at-large elections. Finally, the district court held that changes in the location of polling places did not require preclearance since the changes were dictated by necessity. This Court reversed, holding that the district court effectively had inquired into the *merits* of whether the changes had the purpose or effect of discriminating against minority voters—a function reserved for the Attorney General and the United States District Court for the District of Columbia. *Ibid.* The Court explained that annexations, changes to at-large election systems, and changes in polling places are practices that can, in particular cases, discriminate against minority voters. Accordingly, this Court held that all such changes must be precleared. 400 U.S. at 387-394.

That analysis applies here. A transfer in decision-making authority is a practice that can, in particular cases, discriminate against minority voters. Accordingly, all such transfers must be submitted for preclearance, including those that appear innocuous. A showing that the officials serve the same constituency may be persuasive evidence that a particular transfer is without a discriminatory purpose or effect and therefore should be precleared. But such a showing does not eliminate the potential for discrimination,

and so cannot justify exempting all same-constituency transfers from Section 5 review.

For this reason, the district court erred in holding that the transfer of authority in Russell County did not require Section 5 review. Decisionmaking authority over road matters was transferred from individual commissioners elected at large from residency districts to the county engineer, who is appointed by the Commission. This transfer of authority requires preclearance under Section 5. The fact that all these officials ultimately are answerable to all the voters of Russell County, and the State's public policy reasons for the transfer, would support appellee's argument in favor of preclearance once the change is submitted. But those facts do not obviate the need for preclearance.*

3. We also disagree with the district court's holding that transfers of decisionmaking authority that can be characterized as relatively unimportant need not be precleared under Section 5. The district court concluded that such transfers do not require preclearance because they do not have "a significant potential impact on voting rights." J.S. App. A14. But as we noted above, p. 10, *supra*, the preclearance requirement is not limited to those changes with a "significant" impact on voting rights. On the contrary, the language of the statute makes the preclearance requirement applicable to *any* change with respect to voting, no matter how minor. *Allen v. State Bd. of Elections*, 393 U.S. at 566.

* In the past two years, the Attorney General has reviewed over 40 requests for preclearance of changes from district to unit systems of road work. Thus far, the Attorney General has approved all of these requests.

To be sure, certain transfers of authority do not affect voters *at all*, and therefore need not be submitted for preclearance. In particular, there are certain housekeeping and ceremonial duties that may be of interest to the officeholder, but which do not concern voters. In general, only the transfer of a representative's decisionmaking power implicates voters. See Brief for the United States at 10-12, *Rojas v. Victoria Indep. School Dist.*, *supra* (arguing that school board's agenda preparation policy was not subject to the preclearance requirement because it did not shift any decisionmaking power). If a transfer involves decisionmaking power, however, it cannot be dismissed as having no effect on voting simply because the particular decisionmaking power at issue seems less important than other duties of the office. When minority voters lose the power to use their vote to affect a governmental decision, their voting power has been diminished. That they retain the power to influence what a court may regard as more important matters does not redeem that loss.

A test that turned on the relative importance of a particular decisionmaking power would be difficult to administer. In many cases, the Department of Justice would find it necessary to conduct an extensive investigation simply to determine whether a change is subject to preclearance. A covered jurisdiction would face a similar burden in deciding whether it is required to submit a change for preclearance in the first instance. Even after investigation, it might not be clear on which side of the line a particular change falls. What is important to some voters may not be to others. If the road to a voter's home is one the voter's commissioner would schedule for paving but the county commission as a whole would not, the

transfer of authority to set road work priorities from the former to the latter may be—to that voter—an important change indeed. For these reasons, the district court's standard would invite litigation in every Section 5 case to determine the question of coverage. This would not be consistent with the purpose of the preclearance provisions "to provide a speedy alternative method of compliance to covered States." *Morris v. Gressette*, 432 U.S. 491, 503 (1977).

Our concerns are not limited to practicality. The district court's standard would also threaten the prophylactic purpose of Section 5 by permitting covered jurisdictions to decide whether a transfer of authority is sufficiently important to require preclearance. See *McCain*, 465 U.S. at 246 (Section 5 must be interpreted "in light of its prophylactic purpose and the historical experience which it reflects").

For these reasons, the district court erred in holding that the Etowah common fund resolution did not require preclearance. That resolution removed the power of individual commissioners to decide which road projects in their districts would receive priority. Consequently, it involved a transfer of decisionmaking power concerning "the most important aspect of county governance" (J.S. App. A20) from one set of officials to another. See Ala. Code § 23-1-80 (1975 & Supp. 1990) (principal responsibility of county commissions is to maintain roads and bridges). While the power to set internal priorities may not be as important as the power to determine overall funding for a district, voters have an interest in how both functions are performed.

The Etowah common fund resolution was passed while the Commission was undergoing a transition from an at-large system to single-member districts. Such a change might well call for and justify a real-

location of decisionmaking authority. Good government considerations could call for different allocations of powers depending on whether members of an elected body serve specific districts or at large. At-large members may, for example, be expected to have the concerns of the entire county in mind in setting priorities, while members serving only a specific district might have more parochial concerns. But the facts of the Etowah County case illustrate why any such justifications should be examined through the preclearance process. As a result of the common fund resolution, individual commissioners were stripped of their power to determine district funding priorities almost immediately after minority voters were able to elect a commissioner of their choice for the first time. It is hard to imagine a case that more clearly calls for Section 5 review.⁹

⁹ In No. 90-712, appellants contend (J.S. 4-6) that a change with no potential for discrimination at the time it is implemented (and therefore not subject to preclearance), may nevertheless become subject to preclearance at a later date if subsequent changes create a potential for discrimination. In our view, the changes at issue in this case were subject to the preclearance requirement at the time they were made. Accordingly, the Court need not reach this additional question. But if the Court were to reach this question, the position of the United States is that a change not subject to preclearance at the time it is implemented may not thereafter become subject to preclearance because of subsequent, unanticipated changes. The rule appellants argue for is not derived from the language or legislative history of Section 5, and would impose an unwarranted degree of uncertainty on State and local governments. Of course, efforts to evade the preclearance requirement by implementing a covered change in two or more steps are subject to preclearance. In addition, if a covered jurisdiction fails to submit a change that is subject to preclearance, and the Department of Justice thereafter reviews

CONCLUSION

This Court should note probable jurisdiction in both cases.

Respectfully submitted.

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APRIL 1991

the change, it will consider intervening developments in determining whether to interpose an objection. See *City of Rome v. United States*, 446 U.S. at 186.

JUN 19 1991

OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1990

LAWRENCE C. PRESLEY, individually and on behalf of
others similarly situated,

Appellant,

vs.

ETOWAH COUNTY COMMISSION,

Appellee.

ED PETER MACK, and NATHANIEL GOSHA, III,
individually and on behalf of others similarly situated,

Appellants,

vs.

RUSSELL COUNTY COMMISSION,

Appellee.

On Appeal From The United States District Court
For The Middle District Of Alabama

JOINT APPENDIX

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Appeals Docketed 26 October 1990
Probable Jurisdiction Noted 13 May 1991

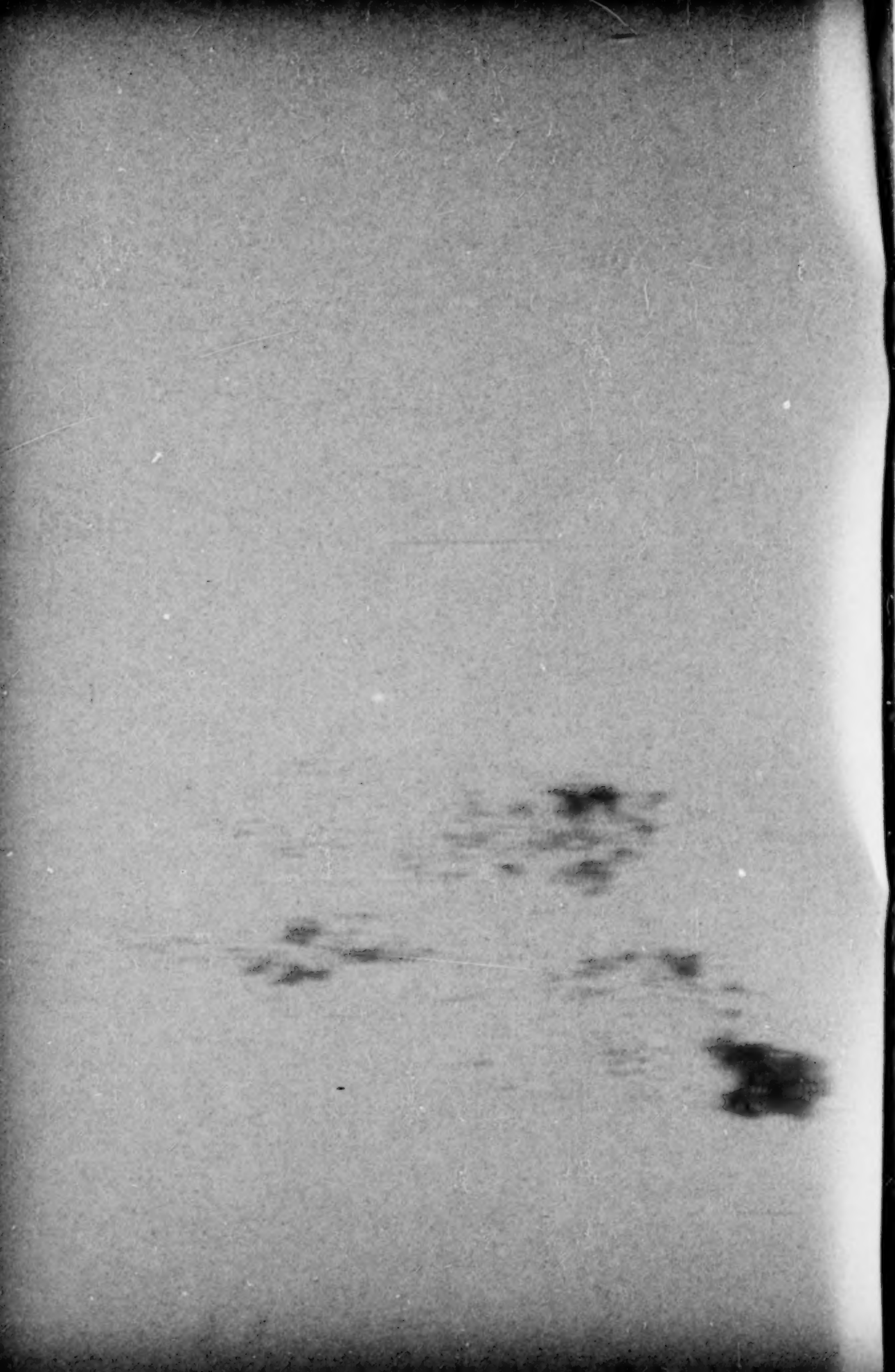


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| <u>District</u> | | <u>Off.</u> | <u>Docket No.</u> | | <u>OR</u> |
|--------------------|------------|-------------|-------------------|---------------|-------------------|
| | | | <u>Yr.</u> | <u>Number</u> | |
| 1127 | | 3 | 89T | 00459E | 13 |
| <u>Filing Date</u> | | | | <u>Nature</u> | <u>R</u> |
| <u>Mo.</u> | <u>Day</u> | <u>Yr.</u> | <u>J</u> | <u>Suit</u> | <u>23</u> |
| 05 | 05 | 89 | 3 | 441 | |
| <u>Judge</u> | <u>Mg.</u> | <u>Jury</u> | <u>ARB</u> | <u>MDL</u> | <u>Docket</u> |
| | | <u>Dem.</u> | | <u>Docket</u> | <u>Yr. Number</u> |
| 2706 | | D | | | 89T 00459 E |

CAUSE: TITLE 28 SEC. 1651 - CIVIL RIGHTS VOTING
Declaratory and injunctive relief requested.

PLAINTIFFS

ED PETER MACK;
NATHANIEL GOSHA, III;
LAWRENCE C. PRESLEY;
and @WILLIAM AMERICA,

~~---individually---~~
~~--and on behalf of other--~~
~~-----similarly-situated-----~~

#UNITED STATES OF
AMERICA

@dismissed per
11-20-89 order
#added per 3-8-90 order

DEFENDANTS

RUSSELL COUNTY
COMMISSION,
ETOWAH COUNTY
COMMISSION, and
~~---*ESCAMBIA COUNTY---~~
~~--COMMISSION--~~

*dismissed per
10-30-89 order

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COURTRAN

☐ CHECK HERE IF CASE WAS FILED IN
FORMA PAUPERIS

FILING FEES PAID

DATE 5/5/89 8/28/90

RECEIPT NUMBER #29465 (\$120.00) #38010 (\$10.00)

C.D. NUMBER

STATISTICAL REPORTS PROCESSED

Filing 6-5-89

Termination 10-5-90

Change _____

UNITED STATES DISTRICT COURT DOCKET

DC 111S (Rev. 7/85)

PROCEEDINGS

| DATE 1989 | NR. | CA No. 89-T-459-E |
|--------------|-----|---|
| May 5 | 1 | Complaint. <i>Injunctive relief requested.</i> |
| 25 | 3 | Answer of defendant Etowah County Commission to complaint. Referred to Judge Thompson. (Copy of AO 85 mailed to counsel.) |
| 26 | 4 | Answer of defendants Escambia County and Russell County to complaint. Referred to Judge Thompson. |
| June 2 | 5 | Plaintiff's MOTION for certification of class. Referred to Judge Thompson. |
| Oct 23 | 38 | Defendant Russell Co.'s motion for summary judgment. (Exhibits 1-6, A-B attached.) Referred to Judge Thompson. |

- Nov 2 44 ORDER that plaintiffs' motion for certification of class filed 6-2-89 is granted; that the following 3 classes are certified pursuant to Fed.R.Civ.P. 23(a) and (b)(2): all African-American citizens of district 4 of Russell Co. to be represented by plaintiff Nathaniel Gosha, III; all African-American citizens of district 5 of Russell Co. to be represented by plaintiff Ed peter Mack; and all African-American citizens of district 5 of Etowah Co. to be represented by plaintiff Lawrence C. Presley; that defendant Escambia Co. Comm's 7-14-89 motion to strike, etc. is denied as moot; that defendant Russell Co. Comm.'s 7-14-89 motion to strike, etc. is denied. (Copies mailed to counsel.) EOD 11-2-89.
- Nov 20 50 Defendant Russell County's amended motion for summary judgment. (Attachment.) Referred to Judge Thompson.
- Nov 29 53 ORDER denying the motion for summary judgment filed by defendant Russell Co. Commission on 10-23-89. (Copies mailed to counsel.) EOD 11-29-89.
- Dec 21 60 Plaintiffs' motion for leave to file amended complaint and to convene 3 judge court for Russell Co. Referred to Judge Thompson.

- Dec 22 61 ORDER that plaintiffs' 12-21-89 motion for leave to file amended complaint is granted; that the TRIAL of this case as to defendant Russell Co. Commission is CONTINUED generally; that the TRIAL WILL proceed as scheduled as to defendant Etowah Co. Commission. (Copies mailed to counsel.) EOD 12-22-89.
- Dec 22 62 AMENDED COMPLAINT.
- Dec 29 66 U.S. Court of Appeals Chief Judge Gerald Tjoflat's designation of Judge Frank M. Johnson and Judge Truman M. Hobbs to serve with requesting Judge Myron Thompson as members of this court to hear and determine action of this cause. (Copies mailed to counsel, Judges Thompson, Hobbs and Johnson.) EOD 1-2-90.
- 1990
- Jan 4 67 ORDER that the section 5 claim against defendant Russell Co. Commissions is set for final submission on the merits to the three-judge court on 2-22-90 on the briefs and evidentiary materials submitted by the parties; that the parties are allowed until 2-5-90 to complete discovery; that plaintiffs are directed to submit their brief and evidentiary materials by 2-9-90; that defendant Russell Co. Commissions [sic] is directed to submit its brief and evidentiary materials by 2-16-90; that plaintiffs may file a reply brief by 2-22-90. (copies mailed to counsel; furnished to Judges Johnson and Hobbs.) EOD 1-4-90.

| | | | |
|-----|----|----|---|
| | 12 | 71 | Defendant Russell County's ANSWER TO AMENDED COMPLAINT. Referred to Judge Thompson. |
| Feb | 8 | 75 | Plaintiffs' motion for leave to file second amended complaint and to convene three-judge court for Etowah Couty [sic] Commission. Referred to Judge Thompson. |
| Feb | 14 | 78 | ORDER that plaintiffs' motion for leave to file second amended complaint and to convene three-judge court for Etowah Co. Comm. filed 2-8-90 is granted. (Copies mailed to counsel; furnished to Judges Hobbs and Johnson.) EOD 2-14-90. |
| Feb | 14 | 79 | SECOND AMENDED COMPLAINT. |
| Feb | 26 | 84 | Defendant Etowah County Commission's answer to second amended complaint. (Exhibit A attached.) Referred to Judge Thompson. |
| Mar | 8 | 89 | ORDER that the United States of America is requested to participate in all aspects of this litigation regarding the claims against defendants Russell Co. Comm. and Etowah Co. Comm., including briefing and oral argument; that the U.S. is requested to file its brief by 3-23-90; that oral argument is scheduled for 4-11-90 at 10:00 a.m., 2nd fl courtroom, USDC, Montgomery [sic]; directing the Clerk to mail a copy of this order to Hon. James P. Turner, Hon. Barry Weinberg and Hon. James Wilson. (Copies mailed to counsel, Attys. Turner & Weinberg; furnished to Atty. James Wilson, Judges Hobbs and Johnson.) EOD 3-8-90. |

- Aug 1 102 ORDER OF COURT, per Judge Frank Johnson, requiring Etowah County to apply forthwith for preclearance of the 1987 road supervision resolution; that if Etowah County chooses not to apply, or if preclearance is not obtained within 60 days from the date of this order, Etowah County shall be enjoined from enforcing the resolution. Concurrence by Judge Truman Hobbs. Concurrence in part and dissention in part by Judge Myron Thompson. (Copies mailed to counsel; furnished USA.) EOD 8-1-90.
- Aug 14 105 Plaintiff's motion to alter or amend judgment entered 8/1/90. Referred to Judge Thompson.
- Aug 21 106 ORDER of Judge Frank Johnson and Judge Truman Hobbs denying plaintiffs' motion to alter or amend judgment. Dissention by Judge Myron Thompson. (Copies mailed to counsel; furnished USA.) EOD 8-21-90.
- Aug 27 107 Plaintiffs' Ed Peter Mack and Nathaniel Gosha, III's Notice of Appeal to the Supreme Court of the United States from the Order entered 8/1/90 and the Judgment entered 8/21/90. (Copies mailed to Leslie Proll, James U. Blacksher, and John C. Falkenberry; Edward Still; James P. Turner; Barry H. Weinberg; Jack Floyd and Mary Ann Stackhouse; James W. Webb; furnished James E. Wilson.)

- Aug 27 108 Plaintiff Lawrence C. Presley's Notice of Appeal to the Supreme Court of the United States from the Order entered 8/1/90 and the Judgment entered 8/21/90. (Copies mailed to Leslie Proll, James U. Blacksher, and John C. Falkenberry; Edward Still; James P. Turner; Barry H. Weinberg; Jack Floyd and Mary Ann Stackhouse; James W. Webb; and furnished James E. Wilson.)
- Sep 17 109 ORDER that this case is stayed as to the section 2 and related matters pending before the single-judge court, pending review of the section 5 claims by the Supreme Court of the United States. The clerk is directed to close this file administratively pending appellate review. (Copies mailed to counsel; furnished USA and Judges Johnson and Hobbs.) EOD 9/17/90.
-

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE MIDDLE
DISTRICT OF ALABAMA, EASTERN DIVISION

| | | |
|------------------------|---|----------------|
| ED PETER MACK; et al., |) | |
| Plaintiff, |) | |
| v. |) | CIVIL ACTION |
| RUSSELL COUNTY |) | NO. 89-T-459-E |
| COMMISSION, et al., |) | |
| Defendants. |) | |

ORDER

FILED NOV 2 1989

The three plaintiffs in this lawsuit, who are African-American voters and were duly elected as members of two county commissions, charge that each of the commissions has a policy of excluding black county representatives from participating on an equal basis with white representatives in determining the manner in which road and bridge revenues are distributed throughout that county. The two county commissions sued are the Russell County Commission and the Etowah County Commission. The plaintiffs rest this lawsuit on § 1983,¹ § 2 of the Voting Rights Act of 1965, as amended,² and Title VI of the Civil Rights Act of 1964, as amended.³

This cause is now before the court on a motion for certification of a class, filed by the three plaintiffs. For

¹ 42 U.S.C.A. § 1983.

² 42 U.S.C.A. § 1973.

³ 42 U.S.C.A. §§ 2000d, *et seq.*

reasons that follow, the court concludes that three separate classes of African-American citizens, corresponding to each of the districts that the plaintiffs represent, should be certified.

Each of the two county commissions, according to the plaintiffs' complaint, was recently divided into single-member districts with one or more majority-black districts, as part of a court order designed to remedy unlawful dilution of black voting strength caused by prior at-large elections.⁴ As a result of the divisions, plaintiffs Nathaniel Gosha, III, and Ed Peter Mack were elected from districts four and five, respectively, to serve on the Russell County Commission; and plaintiff Lawrence C. Presley was elected from district five to serve on the Etowah County Commission.

These three plaintiffs are seeking class certification under Fed.R.Civ.P. 23(a) and (b)(2). To do so, they must meet five requirements for each of the three classes sought to be certified. Whether these requirements have been met is a procedural question distinct from the merits of the action.⁵ *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178-79, 94 S. Ct. 2140, 2152-53 (1974). These requirements,

⁴ By order dated March 17, 1985, in *Sumbry v. Russell County*, civil action no. 84-T-1386-E, the Russell County Commission went to single-member districts; and by order dated November 12, 1986, in *Dillard v. Crenshaw County*, civil action no. 85-T-1332-N, the Etowah County Commission went to single-member districts.

⁵ The defendant improperly spend much of their briefs challenging the merit in the plaintiffs' complaint.

when established, assure that the class claims are those fairly encompassed by the claims being brought by the plaintiffs. See *General Telephone Co. v. EEOC*, 446 U.S. 318, 330-31, 100 S. Ct. 1698, 1706-07 (1980).

The first requirement that each of the plaintiffs must establish is numerosity – a showing that the class is “so numerous that joinder of all members is impracticable.” Rule 23(a)(1). Second, each must demonstrate that there are common questions of law or fact to the class. Rule 23(a)(2). Third, each must establish that the claims or defenses of the representative party are typical of the claims or defenses of the class. Rule 23(a)(3). Fourth, each must show that, as a representative of the class, he will “fairly and adequately protect the interest of the class.” Rule 23(a)(4). And finally, each must prove that his county commission “acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.” Rule 23(b)(2).

As stated, the court will allow each plaintiff, as a voter and citizen of the district from which he was elected, to represent all the African-American citizens in that district. The evidence clearly reflects that the number of blacks affected in each district, as claimed by the plaintiffs, is large enough to make joinder unwieldy.

The requirements of commonality and typicality “tend to merge” and, consequently, are usually considered together. *General Telephone Co. v. Falcon*, 457 U.S. 147, 157 n.13, 102 S. Ct. 2364, 2370 n. 13 (1982). The purposes of these two interrelated requirements are to ensure that prosecution of a class action is an economical manner in

which to proceed, and that the interests of the absent class members will be fairly and adequately protected by the named plaintiff. *Id.* These dual requirements do not require that all of the disputed questions of law and fact be the same; rather, it is only required that those claims actually litigated in the suit simply be those fairly represented by the named plaintiff. *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1557 (11th Cir.), *cert. denied*, ___ U.S. ___, 107 S. Ct. 274 (1986). Here, each plaintiff, as an African-American voter and citizen of the district from which he was elected, does, in fact, present a claim identical to those which would be presented by all other African-American citizens in that district: that is, that the county commission is diluting black voting strength by denying to those duly elected from majority-black districts the same rights and privileges given those elected from majority-white districts. The typicality and commonality requirements are met.⁶

The determination of adequacy of representation is factual and depends upon the circumstances of the particular case being litigated. *Eastland v. Tennessee Valley Authority*, 704 F.2d 613, 618 (11th Cir. 1983), *modified*, 714 F.2d 1066, *cert. denied*, 465 U.S. 1066, 104 S. Ct. 1415 (1984). In determining adequacy of representation, the court must address both the adequacy of the plaintiff and the adequacy and competency of the plaintiff's counsel.

⁶ The defendants challenge whether the plaintiffs, as *elected officials*, may pursue the interests of *voters and citizens*. The court need not reach this issue, because the plaintiffs may obviously pursue these interest [sic] to the extent they are also *voters and citizens*.

Griffin v. Carlin, 755 F.2d 1516, 1532 (11th Cir. 1985). There is nothing in the record to suggest that the interests of each of the plaintiffs are antagonistic to those of the rest of the class each plaintiff seeks to represent.⁷ And, as for the legal representation of plaintiffs' counsel, they are well-experienced in voting rights cases and are thus "qualified, experienced, and generally able to conduct the proposed litigation." *Id.*, at 1533.

Finally, the injunctive, declaratory, and other equitable relief that each plaintiff seeks appears to be appropriate to his class as a whole. See *Jordan v. Swindall*, 105 F.R.D. 45, 49 (1985).

Having satisfied all of the requirements necessary to proceed under Rule 23(a) and (b)(2), each of the plaintiffs is entitled to represent a class consisting of all African-American citizens of the plaintiff's district.

Accordingly, it is the ORDER, JUDGMENT, and DECREE of this court:

(1) That the plaintiffs' motion for certification of class, filed June 2, 1989, is granted; and

(2) That the following three classes are certified pursuant to Fed.R.Civ.P. 23(a) and (b)(2):

(a) All African-American citizens of district four of Russell County to be represented by plaintiff Nathaniel Gosha, III;

⁷ The defendants suggested that the plaintiffs could not properly represent blacks residing outside their districts. However, the classes, as certified by the court, do not include black citizens outside the plaintiffs' districts.

(b) All African-American citizens of district five of Russell County to be represented by plaintiff Ed Peter Mack; and

(c) All African-American citizens of district five of Etowah County to be represented by plaintiff Lawrence C. Presley.

It is further ORDERED that defendant Escambia County Commission's July 14, 1989, motion to strike, etc., is denied as moot.

It is further ORDERED that defendant Russell County Commission's July 14, 1989, motion to strike, etc., is denied.

DONE, this the 2nd day of November, 1989.

/s/ Myron H. Thompson
UNITED STATES
DISTRICT JUDGE

EOD 11-2-89

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE MIDDLE
DISTRICT OF ALABAMA, NORTHERN DIVISION

| | | |
|----------------------------|---|----------------|
| ED PETER MACK; NATHANIEL |) | |
| GOSHA, III; and |) | [Filed 22 |
| LAWRENCE C. PRESLEY, |) | December 1989] |
| individually and on |) | |
| behalf of others similarly |) | |
| situated, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| VS. |) | CIVIL ACTION |
| |) | NO. 89-T-459-E |
| RUSSELL COUNTY COMMISSION, |) | |
| and ETOWAH |) | |
| COUNTY COMMISSION, |) | |
| |) | |
| Defendants. |) | |

AMENDED COMPLAINT

I. NATURE OF ACTION

1. This is an action to enforce permanent injunctions entered by this Court (Thompson, J.) in prior actions and otherwise to vindicate the federally protected voting rights of African-American citizens. Specifically, the suit is brought to prevent two majority white county commissions elected according to districting plans ordered by this Court from maintaining policies and practices which dilute Black voting strength by systematically denying members elected from majority Black districts equal rights, privileges, duties and immunities of office.

II. JURISDICTION

2. Jurisdiction of this Court is invoked pursuant to the All Writs Act, 28 U.S.C. section 1651, pursuant to 28

U.S.C. sections 1331 and 1343, and pursuant to the Voting Rights Act of 1965, as amended, 42 U.S.C. section 1973j(f).

III. PARTIES

3. Plaintiffs Nathaniel Gosha, III, and Ed Peter Mack are African-American citizens of the United States over the age of nineteen (19) years residing in Phenix City Alabama. Mr. Gosha and Mr. Mack are members of the Russell County Commission who have been duly elected from single-member districts 4 and 5, which are two of the three Russell County Commission districts with Black voter majorities.

4. Plaintiff Lawrence C. Presley is an African-American citizen of the United States over the age of nineteen (19) years residing in Gadsden, Alabama. Mr. Presley is the member of the Etowah County Commission who has been duly elected from single-member district 5, which is the only Etowah County Commission district with a Black voter majority.

5. Defendants Russell County Commission and Etowah County Commission are the governing bodies of Russell and Etowah Counties, which are political subdivisions of the State of Alabama.

IV. CLASS ACTION

6. Plaintiffs bring this suit in their individual capacities on behalf of themselves and as a class action, pursuant to Rules 23(a) and (b)(2), F.R.C.P., on behalf of all African-American citizens of Russell and Etowah Counties.

V. ALLEGATIONS OF FACT

A. Russell County

7. The Russell County Commission has been elected by authority of an order of this Court (Thompson, J.) dated March 17, 1985, entered in *Sumbry v. Russell County*, CA No. 84-T-1386-E, which approved a consent decree providing for elections from seven single-member districts in 1988, in order to remedy unlawful dilution of Black voting strength caused by the prior at-large election system. Districts 4 and 5 are majority Black districts. Plaintiffs Gosha and Mack were elected by the voters of Districts 4 and 5 in 1986.

8. Although the civil action referred to in the preceding paragraph was dismissed, the injunction entered therein is permanent and has never been modified.

9. Road and bridge revenues represent the vast majority of the county's budget and of public monies over which the commissioners exercise discretionary authority.

10. Prior to the election of the first Black county commissioners, the Russell County Commission maintained a policy and practice of dividing the road and bridge budget among the five commissioners elected at large from residency subdistricts, each of whom exercised exclusive discretion and control over the road shops, road equipment, materials, expenditures and employees in their respective districts. Defendant maintained this practice as late as 1986 notwithstanding the passage of Act No. 79-652, 1979 Acts of Alabama, p. 1132, on July 30, 1979, which vested in the Russell County Engineer all

functions, duties and responsibilities for roads, highways, bridges and ferries without regard to county commission district lines. A copy of Act No. 79-652 is attached hereto as Exhibit A.

11. Before plaintiffs Gosha and Mack took office, the all-white, at-large elected Russell County Commission decided to implement the unit system set up by the aforesaid Act No. 79-652 for administering the road and bridge budget. Under the unit system, all commissioners purportedly share authority equally over the road and bridge budget and delegate day-to-day executive authority to the county engineer.

12. In practice, however, the unit system is a sham. Two white commissioners have retained effective control over all road and bridge expenditures in the county. There are three road shops in the county. Two of them are located in District 6, represented by Commissioner Claud Parkman, and the third is located in District 7, represented by Commissioner Ernest Allen. The county engineer, who is the former son-in-law of Commissioner Parkman, defers to the discretion of these two commissioners with respect to use of the shops, materials, equipment and employees located in their districts, and the plaintiffs are left with no effective authority over the road and bridge budget.

13. The foregoing policies and practices of defendant Russell County Commission dilute the voting strength of Black citizens of the county by systematically denying their representatives equal rights, privileges, duties and immunities of office.

14. Based on information provided undersigned counsel by the U.S. Department of Justice, Act No. 79-652 has never been submitted for preclearance under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. sec. 1973c. Plaintiffs are further informed and believe that in October 1989 the Department of Justice sent a letter to the Russell County Commission officially requesting that said Act No. 79-652 be submitted for preclearance, but that Russell County has to date made no response to said request.

15. Act No. 79-652 may not be enforced prior to its receiving preclearance under Section 5 of the Voting Rights Act, because the unit system it establishes transfers important governmental functions from the supervision and control of elected county commissioners to the county engineer and thus constitutes a changed standard, practice or procedure with respect to voting, within the meaning of 42 U.S.C. sec. 1973c.

16. Because Act No. 79-652 has not received Section 5 preclearance, its implementation by defendant Russell County Commission violates the federally protected voting rights of plaintiffs and the class of Black citizens of Russell County. By federal law, Russell County presently should continue using its prior practice of dividing road and bridge duties and responsibilities equally and in a racially fair manner among the county commissioners, who are now elected from single-member districts.

17. Defendant Russell County Commission receives some federal funds which are expended as part of the county's budget.

B. Etowah County

18. The Etowah County Commission has been elected by authority of an order of this Court (Thompson, J.) dated November 12, 1986, entered in *Dillard v. Crenshaw County*, CA No. 85-T-1332-N, which approved a consent decree providing for staggered elections from six single-member districts in 1986 and 1988, in order to remedy unlawful dilution of Black voting strength caused by the prior at-large election system. District 5 is the only district that is majority Black. Plaintiff Presley was elected by the voters of District 5 in 1986.

19. Although defendant Etowah County Commission has been dismissed from the civil action referred to in the preceding paragraph, the injunction entered therein is permanent and has never been modified.

20. Paragraph 3 of the consent decree provides:

When the District 5 and 6 Commissioners are elected in the special 1986 election, they shall have all the rights, privileges, duties and immunities of the other commissioners, who have heretofore been elected at-large, until their successors take office.

21. Road and bridge revenues represent the vast majority of the county's budget and of public monies over which the commissioners exercise discretionary authority.

22. Defendant Etowah County Commission has divided discretionary authority over the road and bridge budget among the commissioners elected from majority white Districts 1, 2, 3, and 4. These four county commissioners exercise effectively exclusive control over the

road shops, road equipment, materials, expenditures and employees in their respective districts and jointly share control of road and bridge expenditures in the other two districts. The commissioners elected from Districts 5 and 6 are systematically denied effective authority, discretion and political influence over the road and bridge operations of Etowah County.

23. The foregoing policies and practices of defendant Etowah County Commission dilute the voting strength of Black citizens of the county by systematically denying their representative equal rights, privileges, duties and immunities of office.

24. Defendant Etowah County Commission receives some federal funds which are expended as part of the county's budget.

VI. FEDERAL CAUSES OF ACTION

25. Implicit in the above described consent decrees approved by this Court is a requirement that commissioners elected from the majority Black single-member districts enjoy and exercise the same rights, privileges, duties and immunities of office as are enjoyed and exercised by all other commissioners.

26. This Court has the duty and authority, under 28 U.S.C. section 1651, to issue all writs necessary or appropriate in aid of its jurisdiction. Specifically, it has authority to conduct such proceedings and to issue such orders as necessary to enforce the injunctions entered against the defendants in *Dillard v. Crenshaw County* and *Sumbry v. Russell County* and to ensure that they are executed in a

racially fair and equitable manner. Plaintiffs and the class they seek to represent are entitled to invoke the enforcement powers of this Court to obtain relief from the unlawful policies and practices complained of herein.

27. Defendants and each of them have received and used federal funds, and in consideration thereof defendants have agreed to comply with Title VI of the Civil Rights Act and the regulations issued pursuant to Title VI. The allegations of fact set out above constitute violations of plaintiffs' rights and the rights of the class they seek to represent guaranteed by Title VI of the Civil Rights Act of 1964, 42 U.S.C. section 2000d et seq.

28. The allegations of fact set out above constitute violations of plaintiffs' rights and the rights of the class they seek to represent guaranteed by the Equal Protection Clause of the fourteenth amendment, for which a remedy is provided by 42 U.S.C. section 1983.

29. The policies and practices set out above dilute the voting strength of plaintiffs and the class of Black citizens they seek to represent, deny them equal access to the political processes of state government, and thus violate their rights under Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. section 1973, and the fifteenth amendment.

30. Russell County Commission's implementation of a road and bridge unit system without first obtaining preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. sec. 1973c, of Act No. 79-652, 1979 Acts of Alabama, violates the rights of plaintiffs and the class they represent to be protected against changes in voting practices and procedures that may by their terms or by their

manner of implementation dilute the voting strength of Black citizens.

VII. PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray that the Court will set this matter for a speedy hearing, following which it will enter orders providing relief as follows:

A. Notify the Chief Judge of the Eleventh Circuit, pursuant to 28 U.S.C. sec. 2284, that a three-judge court should be convened, pursuant to 42 U.S.C. sec. 1973c, to determine whether an injunction should issue against defendant Russell County Commission restraining said defendant

(a) from implementing the unit system provided by Act No. 79-652, 1979 Acts of Alabama, until and unless said act receives preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. sec. 1973c, and

(b) from failing or refusing immediately to reinstate the practice of dividing among the elected members of the Russell County Commission, on an equal and racially fair basis consistent with the requirements of the Voting Rights Act, all duties and responsibilities for construction and maintenance of roads, bridges, highways and ferries in Russell County.

B. Enter orders requiring defendants to show cause why they should not be held in civil contempt of Court for failure to comply in a racially fair and equitable manner with the permanent injunctions entered by this Court in *Dillard v. Crenshaw County* and *Sumbry v. Russell County*.

C. Alternatively, should the Court determine that the requirements of racial equality in its injunctions are not specific enough to warrant immediate contempt proceedings, that it will clarify said injunctions to make said obligation explicit, in the manner set out hereafter.

D. Issue a declaratory judgment declaring that the wrongs complained of herein violate the rights of plaintiffs and the class they seek to represent guaranteed by Title VI of the Civil Rights Act of 1964, the fourteenth and fifteenth amendments, and Section 2 of the Voting Rights Act.

E. Enter preliminary and permanent injunctions requiring defendants and each of them:

(1) To establish policies, procedures and practices that ensure that all commissioners enjoy equally on a racially fair basis all the rights, privileges, duties and immunities of office, including specifically equal authority, influence and control over the road and bridge budgets.

(2) To take all steps necessary effectively to remedy the racially unfair expenditure of road and bridge funds since entry of permanent injunctions by this Court.

F. Plaintiffs emphasize that, with respect to Russell County, the relief they seek herein may not necessarily preclude use of a road and bridge unit system if Act No. 79-652 receives Section 5 preclearance and if the unit system is implemented in a way that does not as a practical matter violate the rights of Black citizens to equal access to and influence in the political processes of Russell County.

G. Retain jurisdiction of this action for a sufficient time to ensure full compliance with the remedial decree requested herein.

H. Award plaintiffs their costs incurred in this case, together with reasonable attorneys' fees, pursuant to 42 U.S.C. sections 1973l(e) and 1988.

I. Grant such additional and further relief as the Court deems proper and just in the premises.

/s/ JU Blacksher

Edward Still
714 South 29th Street
Birmingham, AL 35233-2810
205/322-6631

James U. Blacksher
John C. Falkenberry
Leslie M. Proll
5th Floor Title Bldg.
300 21st Street North
Birmingham, AL 35203
205/322-1100

Attorneys for Plaintiffs

Exhibit A

Act No. 79-652

H. 977 - Adams (C), Whatley

AN ACT

Relating to Russell County; to provide that all functions, duties and responsibilities for the construction, maintenance and repair of public roads, highways, bridges and ferries in the county shall be vested in the county engineer and shall be maintained on the basis of the county as a whole, without regard to district or beat lines, and to prescribe certain duties for the county engineer.

Be It Enacted by the Legislature of Alabama:

Section 1. All functions, duties and responsibilities for the construction, maintenance and repair of public roads, highways, bridges and ferries in Russell County are hereby vested in the county engineer, who shall, insofar as possible, construct and maintain such roads, highways, bridges and ferries on the basis of the county as a whole or as a unit, without regard to district or beat lines.

Section 2. The county engineer shall assume the following duties, but shall not be limited to such duties:

(1) to employ, supervise and direct all such assistants as are necessary properly to maintain and construct the public roads, highways, bridges, and ferries of Russell County, and he shall have authority to prescribe their duties and to discharge said employees for cause, or when not needed; (2) to perform such engineering and surveying service as may be required, and to prepare and maintain the necessary maps and records; (3) to maintain the necessary accounting records to reflect the cost of the county highway system; (4) to build, or construct new roads, or change old roads, upon the order of the county commission; (5) insofar as is feasible to construct and maintain all country roads on the basis of the county as a whole or as a unit.

Section 2. The provisions of this act are severable. If any part of this act is declared invalid or unconstitutional, such declaration shall not affect the part which remains.

Section 3. All laws or parts of laws which conflict with this act are hereby repealed.

Section 4. This act shall become effective immediately upon its passage and approval by the Governor, or upon its otherwise becoming a law.

Approved July 30, 1979

Time: 6:00 P.M.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

| | | |
|-----------------------|---|-------------------------|
| ED PETER MACK, et al. |) | [Filed 24 January 1990] |
| |) | |
| Plaintiffs, |) | CIVIL ACTION NO. |
| |) | 89-T-459-E |
| vs. |) | |
| |) | |
| RUSSELL COUNTY |) | |
| COMMISSION, et al. |) | |
| |) | |
| Defendants. |) | |

ANSWER OR DEFENDANT RUSSELL COUNTY TO
AMENDED COMPLAINT

Defendant Russell County answers the amended complaint as follows:

1. Paragraphs 1 and 2 are denied.
2. Paragraphs 3, 4 and 5 are admitted.
3. Paragraphs 6 through 17 are denied.
4. This defendant has insufficient information to either admit or deny paragraphs 18 through 24.
5. Paragraphs 25 through 29 are denied.

AFFIRMATIVE DEFENSES

1. Defendant pleads that said plaintiffs Gosha and Mack participated in all pertinent decisions of the Russell County Commission and said decisions were not racially motivated.
2. Said defendant pleads consent waiver and estoppel.

3. Defendant denies federal jurisdiction.
4. Defendant pleads the statute of limitations.
5. Defendant pleads that Act No. 79-652 is not subject to Section 5 pre-clearance of the Voting Rights Act.
6. Russell County adopted the unit system May 18, 1979, and has consistently operated thereunder since that date.

/s/ James W. Webb
James W. Webb

Defendant Russell County requests trial by jury on all issues that are permissible to be tried by jury. Alternatively, defendant Russell County requests the Court for advisory jury trial.

/s/ James W. Webb
James W. Webb

OF COUNSEL:

WEBB, CRUMPTON, MCGREGOR,
SASSER, DAVIS & ALLEY
One Commerce Street, Suite 700
P.O. Box 238
Montgomery, AL 36101-0238
(205) 834-3176

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Answer to Amended Complaint upon James U. Blacksher, Esq., Attorney for Plaintiffs, 5th Floor Title Bldg., 300 21st Street North, Birmingham, AL 35203; Edward Still, Esq., 714 South 29th Street, Birmingham, AL 35233-2810; John C. Falkenberry, Esq., Fifth Floor, Title Building, 300 21st Street North, Birmingham, AL 35203;

and Jack Floyd, Esq., Attorney for Etowah County, 816 Chestnut Street, Gadsden, AL 35901; by placing a copy of same in the U.S. Mail, postage prepaid, on this the 11th day of January, 1990.

/s/ James W. Webb
James W. Webb

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

| | | |
|---------------------------|---|----------------|
| ED PETER MACK; NATHANIEL |) | |
| GOSHA, III; and LAWRENCE |) | [Filed 14 |
| PRESLEY, individually and |) | February 1990] |
| on behalf of others |) | |
| similarly situated, |) | |
| |) | |
| Plaintiffs, |) | CIVIL ACTION |
| |) | NO. 89-T-459-E |
| vs. |) | |
| |) | |
| RUSSELL COUNTY COMMISSION |) | |
| and ETOWAH COUNTY |) | |
| COMMISSION, |) | |
| |) | |
| Defendants. |) | |

SECOND AMENDED COMPLAINT

I. NATURE OF ACTION

1. This is an action to enforce permanent injunctions entered by this Court (Thompson, J.) in prior actions and otherwise to vindicate the federally protected voting rights of African-American citizens. Specifically, this suit is brought to prevent two majority white county commissions elected according to districting plans ordered by this Court from maintaining policies and practices which dilute Black voting strength by systematically denying members elected from majority Black districts equal rights, privileges, duties and immunities of office.

II. JURISDICTION

2. Jurisdiction of this Court is invoked pursuant to the All Writs Act, 28 U.S.C. Section 1651, pursuant to 28

U.S.C. Sections 1331 and 1343, and pursuant to the Voting Rights Act of 1965, as amended, 42 U.S.C. Section 1973j(f).

III. PARTIES

3. Plaintiffs Nathaniel Gosha, III, and Ed Peter Mack are African-American citizens of the United States over the age of nineteen (19) years residing in Phenix City, Alabama. Mr. Gosha and Mr. Mack are members of the Russell County Commission who have been duly elected from single-member districts 4 and 5, which are two of the three Russell County Commission districts with Black voter majorities.

4. Plaintiff Lawrence C. Presley is an African-American citizen of the United States over the age of nineteen (19) years residing in Gadsden, Alabama. Mr. Presley is the member of the Etowah County Commission who has been duly elected from single-member district 5, which is the only Etowah County Commission district with a Black voter majority.

5. Defendants Russell County Commission and Etowah County Commission are the governing bodies of Russell and Etowah Counties, which are political subdivisions of the State of Alabama.

IV. CLASS ACTION

6. Plaintiffs bring this suit in their individual capacities on behalf of themselves and as a class action, pursuant to Rules 23(a) and (b)(2), F.R.C.P., on behalf of all African-American citizens of Russell and Etowah Counties.

V. ALLEGATIONS OF FACT

A. Russell County

7. The Russell County Commission has been elected by authority of an order of this Court (Thompson, J.) dated March 17, 1985, entered in *Sumbry v. Russell County*, CA No. 84-T-1386-E, which approved a consent decree providing for elections from seven single-member districts in 1988, in order to remedy unlawful dilution of Black voting strength caused by the prior at-large election system. Districts 4 and 5 are majority Black districts. Plaintiffs Gosha and Mack were elected by the voters of Districts 4 and 5 in 1986.

8. Although the civil action referred to in the preceding paragraph was dismissed, the injunction entered therein is permanent and has never been modified.

9. Road and bridge revenues represent the vast majority of the county's budget and of public monies over which the commissioners exercise discretionary authority.

10. Prior to the election of the first Black county commissioners, the Russell County Commission maintained a policy and practice of dividing the road and bridge budget among the five commissioners elected at large from residency subdistricts, each of whom exercised exclusive discretion and control over the road shops, road equipment, materials, expenditures and employees in their respective districts. Defendant maintained this practice as late as 1986 notwithstanding the passage of Act. No. 79-652, 1979 Acts of Alabama, p. 1132, on July 30, 1979, which vested in the Russell County Engineer all

functions, duties and responsibilities for roads, highways, bridges and ferries without regard to county commission district lines.

11. Before plaintiffs Gosha and Mack took office, the all-white, at-large elected Russell County Commission decided to implement the unit system set up by the aforesaid Act No. 79-652 for administering the road and bridge budget. Under the unit system, all commissioners purportedly share authority equally over the road and bridge budget and delegate day-to-day executive authority to the county engineer.

12. In practice, however, the unit system is a sham. Two white commissioners have retained effective control over all road and bridge expenditures in the county. There are three road shops in the county. Two of them are located in District 6, represented by Claude Parkman, and the third is located in District 7, represented by Commissioner Earnest Allen. The county engineer, who is the former son-in-law of Commissioner Parkman, defers to the discretion of these two commissioners with respect to use of the shops, materials, equipment and employees located in their districts, and the plaintiffs are left with no effective authority over the road and bridge budget.

13. The foregoing policies and practices of defendant Russell County Commission dilute the voting strength of Black citizens of the county by systematically denying their representatives equal rights, privileges, duties and immunities of office.

14. Based on information provided undersigned counsel by the U.S. Department of Justice, Act No. 79-652 has never been submitted for preclearance under Section

5 of the Voting Rights Act of 1965, 42 U.S.C. Section 1973c. Plaintiffs are further informed and believe that in October 1989 the Department of Justice sent a letter to the Russell County Commission officially requesting that said Act No. 79-652 be submitted for preclearance, but that Russell County has to date made no response to said request.

15. Act No. 79-652 may not be enforced prior to its receiving preclearance under Section 5 of the Voting Rights Act, because the unit system it establishes transfers important governmental functions from the supervision and control of elected county commissioners to the county engineer and thus constitutes a changed standard, practice or procedure with respect to voting, within the meaning of 42 U.S.C. Section 1973c.

16. Because Act No. 79-652 has not received Section 5 preclearance, its implementation by defendant Russell County Commission violates the federally protected voting rights of plaintiffs and the class of Black citizens of Russell County. By federal law, Russell County presently should continue using its prior practice of dividing road and bridge duties and responsibilities equally and in a racially fair manner among the county commissioners, who are now elected from single-member districts.

17. Defendant Russell County Commission receives some federal funds which are expended as part of the county's budget.

B. Etowah County

18. The Etowah County Commission has been elected by authority of an order of this Court (Thompson, J.) dated November 12, 1986, entered in *Dillard v. Crenshaw County*, CA No. 85-T-1332-N, which approved a \$957 consent decree providing for staggered elections from six single-member districts in 1986 and 1988, in order to remedy unlawful dilution of Black voting strength caused by the prior at-large election system. District 5 is the only district that is majority Black. Plaintiff Presley was elected by the voters of District 5 in 1986.

19. Although defendant Etowah County Commission has been dismissed from the civil action referred to in the preceding paragraph, the injunction entered therein is permanent and has never been modified.

20. Paragraph 3 of the consent decree provides:

When the District 5 and 6 Commissioners are elected in the special 1986 election, they shall have all the rights, privileges, duties and immunities of the other commissioners, who have heretofore been elected at-large, until their successors take office.

21. Road and bridge revenues represent the vast majority of the county's budget and of public monies over which the commissioners exercise discretionary authority.

22. Prior to the election of the first Black county commissioner, the Etowah County Commission maintained a policy and practice of dividing the road and bridge budget among the four commissioners elected at large from residency subdistricts, each of whom exercised

exclusive discretion and control over the road shop, road equipment, materials, expenditures and employees in his residency subdistrict.

23. Soon after plaintiff Presley took office, Defendant Etowah County Commission passed two resolutions, over the objections of Presley and the Commissioner from the other "new" district. One resolution divided discretionary authority over the road and bridge operations among the commissioners elected from majority white Districts 1, 2, 3, and 4. The second resolution established a common fund, which was to be budgeted on a county-wide basis, rather than allocated to specific districts, for the repair, maintenance and improvement of all streets, roads and public ways in Etowah County. Copies of the two resolutions, passed on August 25, 1987, are attached hereto as Exhibit A.

24. As a result of the above described resolutions, the white county commissioners elected from Districts One through Four exercise effectively exclusive control over the road shops, road equipment, materials, expenditures and employees in their respective districts and jointly share control of road and bridge expenditures in the other two districts. The commissioners elected from Districts 5 and 6 are systematically denied effective authority, discretion and political influence over the road and bridge operations and budget of Etowah County.

25. The foregoing policies and practices of defendant Etowah County Commission dilute the voting strength of Black citizens of the county by systematically denying their representative equal rights, privileges, duties and immunities of office.

26. Based on information provided undersigned counsel, the two resolutions passed by the Etowah County Commission pertaining to authority over road and bridge operations and budget has never been submitted for preclearance under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. Section 1973c.

27. The two above described resolutions may not be enforced prior to their receiving preclearance under Section 5 of the Voting Rights Act, because the resolutions transfer important governmental functions from the supervision and control of all elected county commissioners to those county commissioners elected from Districts One through Four and thus constitutes a changed standard, practice or procedure with respect to voting, within the meaning of 42 U.S.C. Section 1973c.

28. Because the resolutions have not received Section 5 preclearance, their implementation by defendant Etowah County Commission violates the federally protected voting rights of plaintiffs and the class of Black citizens of Etowah County. By federal law, Etowah County presently should continue using its prior practice of dividing road and bridge duties and responsibilities equally and in a racially fair manner among the county commissioners, who are now elected from [sic] single-member districts.

29. Defendant Etowah County Commission receives some federal funds which are expended as part of the county's budget.

VI. FEDERAL CAUSES OF ACTION

30. Implicit in the above described consent decrees approved by this Court is a requirement that commissioners elected from the majority Black single-member districts enjoy and exercise the same rights, privileges, duties and immunities of office as are enjoyed and exercised by all other commissioners.

31. This Court has the duty and authority, under 28 U.S.C. Section 1651, to issue all writs necessary or appropriate in aid of its jurisdiction. Specifically, it has authority to conduct such proceedings and to issue such orders as necessary to enforce the injunctions entered against the defendants in *Dillard v. Crenshaw County* and *Sumbry v. Russell County* and to ensure that they are executed in a racially fair and equitable manner. Plaintiffs and the class they seek to represent are entitled to invoke the enforcement powers of this Court to obtain relief from the unlawful policies and practices complained of herein.

32. Defendants and each of them have received and used federal funds, and in consideration thereof defendants have agreed to comply with Title VI of the Civil Rights Act and the regulations issued pursuant to Title VI. The allegations of fact set out above constitute violations of plaintiffs' rights and the rights of the class they seek to represent guaranteed by Title VI of the Civil Rights Act of 1964, 42 U.S.C. Section 2000d et seq.

33. The allegations of fact set out above constitute violations of plaintiffs' rights and the rights of the class they seek to represent guaranteed by the Equal Protection Clause of the Fourteenth Amendment, for which a remedy is provided by 42 U.S.C. Section 1983.

34. The policies and practices set out above dilute the voting strength of plaintiffs and the class of Black citizens they seek to represent, deny them equal access to the political processes of state government, and thus violate their rights under Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. Section 1973, and the Fifteenth Amendment.

35. Russell County Commission's implementation of a road and bridge unit system without first obtaining preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. Section 1973c, of Act No. 79-652, 1979 Acts of Alabama, violates the rights of plaintiffs and the class they represent to be protected against changes in voting practices and procedures that may by their terms or by their manner of implementation dilute the voting strength of Black citizens.

36. Etowah County Commission's implementation of two resolutions which reallocate the authority among the county commissioners with respect to the management and budget of the road and bridge system in Etowah County without first obtaining preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. Section 1973c, of Act No. 79-652, 1979 Acts of Alabama, violates the rights of plaintiffs and the class they represent to be protected against changes in voting practices and procedures that may by their terms or by their manner of implementation dilute the voting strength of Black citizens.

VII. PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray that the Court will set this matter for a speedy hearing, following which it will enter orders providing relief as follows:

A. Notify the Chief Judge of the Eleventh Circuit, pursuant to 28 U.S.C. Section 2284, that a three-judge court should be convened, pursuant to 42 U.S.C. Section 1973c, to determine whether an injunction should issue against defendant Etowah County Commission restraining said defendant

(a) from implementing the two Resolutions passed on August 25, 1987, until and unless the Resolutions receive preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. Section 1973c, and

(b) from failing or refusing immediately to reinstate the practice of dividing among the elected members of the Etowah County Commission, on an equal and racially fair basis consistent with the requirements of the Voting Rights Act, all duties and responsibilities for construction and maintenance of roads, bridges, highways and ferries in Etowah County.

B. Enter orders requiring defendants to show cause why they should not be held in civil contempt of Court for failure to comply in a racially fair and equitable manner with the permanent injunctions entered by this Court in *Dillard v. Crenshaw County* and *Sumbry v. Russell County*.

C. Alternatively, should the court determine that the requirements of racial equality in its injunctions are not specific enough to warrant immediate contempt proceedings, that it will clarify said injunctions to make said obligation explicit, in the manner set out hereafter.

D. Issue a declaratory judgment declaring that the wrongs complained of herein violate the rights of plaintiffs and the class they seek to represent guaranteed by Title VI of the Civil Rights Act of 1964, the Fourteenth and Fifteenth Amendments, and Section 2 of the Voting Rights Act.

E. Enter preliminary and permanent injunctions requiring defendants and each of them:

(1) To establish policies, procedures and practices that ensure that all commissioners enjoy equally on a racially fair basis all the rights, privileges, duties and immunities of office, including specifically equal authority, influence and control over the road and bridge budgets.

(2) To take all steps necessary effectively to remedy the racially unfair expenditure of road and bridge funds since entry of permanent injunctions by this Court.

F. Plaintiffs emphasize that, with respect to Russell County, the relief they seek herein may not necessarily preclude use of a road and bridge unit system if Act No. 79-652 receives Section 5 preclearance and if the unit system is implemented in a way that does not as a practical matter violate the rights of Black citizens to equal access to and influence in the political processes of Russell County.

G. Retain jurisdiction of this action for a sufficient time to ensure full compliance with the remedial decree requested herein.

H. Award plaintiffs their costs incurred in this case, together with reasonable attorneys' fees, pursuant to 42 U.S.C. Sections 1973l(e) and 1988.

I. Grant such additional and further relief as the Court deems proper and just in the premises.

Edward Still
714 South 29th Street
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35233-2810
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/s/ James U. Blacksher
James U. Blacksher
John C. Falkenberry
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Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE MIDDLE DISTRICT
OF ALABAMA, NORTHERN DIVISION

| | | |
|---------------------------|---|----------------|
| ED PETER MACK; NATHANIEL |) | |
| GOSHA, III; and LAWRENCE |) | [Filed 26 |
| PRESLEY, individually and |) | February 1990] |
| on behalf of others |) | |
| similarly situated, |) | CIVIL ACTION |
| Plaintiffs |) | NO. 89-T-459-E |
| |) | |
| vs. |) | |
| |) | |
| RUSSELL COUNTY COMMISSION |) | |
| and ETOWAH COUNTY |) | |
| COMMISSION, |) | |
| |) | |
| Defendants |) | |

ANSWER OF DEFENDANT ETOWAH COUNTY
COMMISSION TO SECOND AMENDED COMPLAINT

The Etowah County Commission answers plaintiffs' Second Amended Complaint as follows:

1. Defendant Etowah County Commission denies the allegations of Paragraphs 1 and 2.
2. Defendant Etowah County Commission is without sufficient information to form a belief as to the truth of the matters asserted in Paragraph 3.
3. Defendant Etowah County Commission admits the allegations of Paragraphs 4 and 5.
4. Defendant Etowah County Commission denies that a class should be certified in this matter as alleged in Paragraph 6.

5. Defendant Etowah County Commission is without sufficient information to form a belief as to the truth of the matters asserted in Paragraphs 7 through 17.

6. Defendant Etowah County Commission admits the allegations of Paragraphs 18, 19 and 20.

7. Defendant Etowah County Commission denies the allegations of Paragraph 21.

8. Defendant Etowah County Commission denies the allegations contained in Paragraphs 22, 23, 24 and 25.

9. Defendant Etowah County Commission admits the allegations of Paragraph 26.

10. Defendant Etowah County Commission denies the allegations of Paragraphs 27 and 28.

11. Defendant Etowah County Commission admits the allegations of Paragraph 29 but states further that said federal funds are specially ear-marked as particular grants for particular purposes.

12. Defendant Etowah County Commission denies the allegations of Paragraphs 30, 31, 32, 33, 34 and 36.

13. Defendant Etowah County Commission is without sufficient information to form a belief as to the truth of the matters asserted in Paragraph 35.

14. Defendant Etowah County Commission denies that plaintiff is entitled to any of the relief he seeks in his prayer for relief.

AFFIRMATIVE DEFENSES

15. Defendant Etowah County Commission alleges that plaintiffs have failed to state an appropriate cause of action under the All Writs Act or under the Voting Rights Act of 1965, as amended, or under Title VI of the Civil Rights Act of 1964.

16. Defendant Etowah County Commission states that the Court lacks jurisdiction in this matter.

17. Defendant Etowah County Commission states that it has acted at all times relevant hereto in good faith under the reasonable belief that its acts have been lawful.

18. Defendant Etowah County Commission states that no Section 5 issue is presented for review with respect to the Etowah County Commission. The resolutions in question did not alter or change any voting qualifications or prerequisites to voting, nor did the resolutions change a standard, practice or procedure with respect to voting.

19. Defendant Etowah County Commission alleges that the distribution of administrative authority among elected commissioners does not affect the voting rights of Black citizens and thus is not subject to pre-clearance under Section 5 of the Voting Rights Act of 1965, as amended.

20. Defendant Etowah County Commission alleges that the resolutions at issue do not constitute a *change* covered by Section 5 of the Voting Rights Act of 1965, as amended, and thus, it is not proper to convene a three-judge panel.

21. Defendant Etowah County Commission alleges that the resolutions in issue are ordinary and routine delegations of duties and authority among the elected commissioners. The resolutions do not deprive any of the commissioners or their constituencies of voting power. The budget is voted on by a full commission and the administrative functions for the county are shared by the six commissioners.

22. Defendant Etowah County Commission alleges that the resolutions in issue do not affect the voting rights of the citizens of Etowah County.

23. Defendant Etowah County Commission states that the resolutions in issue were not subject to pre-clearance.

24. Defendant Etowah County Commission alleges that this Court lacks jurisdiction to determine the merits of plaintiffs' claims inasmuch as the 1987 resolutions were not subject to pre-clearance under Section 5 and, thus, it is not appropriate to convene a three-judge court.

25. On January 23, 1990, the Etowah County Commission adopted a "needs-based" resolution which requires the Etowah County Commission to prioritize major road and bridge repair in accordance with certain needs-based factors. The resolution also requires each commissioner to supervise the road work in his district. A copy of said resolution is attached hereto, made a part heretof [sic], and marked as Exhibit A.

/s/ Jack Floyd by Mary Ann Stackhouse
JACK FLOYD, Attorney for
Defendant Etowah County
Commission

/s/ Mary Ann Stackhouse
MARY ANN STACKHOUSE,
Attorney for
Defendant Etowah County
Commission

OF COUNSEL:
FLOYD, KEENER, CUSIMANO & ROBERTS
Attorneys at Law
816 Chestnut Street
Gadsden, AL 35999
Telephone (205) 547-6328
Facsimile (205) 543-3097

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing on the following counsel of record herein by United States mail, postage prepaid, on this the 23 day of February, 1990:

James W. Webb, Esquire
Webb, Crumpton, McGregor, Sasser, Davis & Alley
P. O. Box 238
Montgomery, AL 36101

James U. Blacksher, Esquire
Fifth Floor, Title Building
300 21st Street, North
Birmingham, AL 35203

/s/ Mary Ann Stackhouse
of Counsel

ETOWAH COUNTY
ALABAMA

ROBERT (BOOLEY) HITT

Chairman

M. THOMAS SMITH

District 1

BILLY RAY McKEE

District 2

JESSE BURNS

District 3

W. A. LUTES

District 4

LAWRENCE C. PRESLEY

District 5

BILLY RAY WILLIAMS

District 6

ETOWAH COUNTY COMMISSION

Gadsden, Alabama 35901

Telephone 205/546-2821

"E X T R A C T"

Upon motion of Commissioner McKee, seconded by Commission Smith, with Commissioner Burns and Commissioner Lutes Voting "yes", and with Commissioner Williams voting "no", the attached resolution was passed and adopted:

BE IT RESOLVED BY THE ETOWAH COUNTY COMMISSION: The attached resolution was passed and adopted:

/s/ Robert V. Hitt

ROBERT V. HITT, CHAIRMAN
ETOWAH COUNTY
COMMISSION

ATTEST /s/ Bruce R. Foster

Bruce R. Foster
Chief Clerk

I hereby certify that the attached resolution was passed and adopted on the 23rd day of January, 1990 at the regular scheduled meeting of the Etowah County

Commission as recorded in Minute Book 22, page [sic] 82 and 83.

/s/ Lisa H. Goodwyn

Lisa H. Goodwyn, Secretary

RESOLUTION

WHEREAS, the Etowah County Commission desires to ensure a road and bridge operation that is fair and just to all the citizens of Etowah County,

BE IT THEREFORE RESOLVED AS FOLLOWS:

1. That, with respect to major road and bridge repair and construction, the County Engineer shall, on an annual basis at the adoption of the annual budget, or more frequently if so requested by majority vote of the Commission, present to the Etowah County Commission his department's prioritized recommendations for major road and bridge repair and construction through the County.

2. In developing these prioritized recommendations, the County Engineer shall consider the following factors:

a. the number of county residents adversely affected by the road condition;

b. the frequency and density of travel on the road;

c. the major purpose for which the road is travelled, i.e., residential, commercial, business;

d. the extent to which the health or safety of the residents or travelers is adversely affected by the road condition;

e. the extent to which the proposed repair or construction would improve the health or safety of the residents or travellers;

f. the length of time the road has been in its present condition;

g. the length of time the residential community has existed along the road;

h. the cost of the proposed project;

i. the cost effectiveness of the proposed project.

3. Upon presentation to the Commission of these prioritized recommendations and, after review of these recommendations in light of the aforesaid factors, the Commission shall, by majority vote, at least annually at the time the budget is accepted, determine the priority and timetable for major road repair and construction throughout the County.

4. Minor road repair, such as repair of potholes, and general road maintenance, such as grass cutting, shall not be subject to a vote of the Commission, but shall be determined by the Commissioner responsible for the district where such general maintenance and minor repair must be done.

5. With respect to the supervision of major and minor road repair and construction, each Commissioner shall supervise the work performed in his district.

6. With respect to the daily routine operation of each road shop, each Commissioner assigned to each road shop shall continue to supervise said operations.

PASSED AND ADOPTED this 23rd day of January,
1990.

/s/ Bruce R. Foster
Bruce R. Foster, Chief Clerk
Etowah County Commission

/s/ Lisa H. Goodwyn
Lisa H. Goodwyn, Secretary

IN THE U.S. DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

ED PETER MACK, et al,

Plaintiffs,

CIVIL ACTION
NUMBER
CV-89-T-459-E

versus

RUSSELL COUNTY COMMISSION,

Defendant.

DEPOSITION OF BOOLEY HITT

The deposition of BOOLEY HITT was taken before Cheryl T. Lee, as Commissioner, commencing at 11:05 a.m. on June 29, 1989, by the Defendants, at the law offices of Floyd, Keener, Cusimano & Roberts, Gadsden, Alabama, pursuant to the stipulations set forth herein.

[p. 5] Q. I understand. Are you now, Mr. Hitt, the chairman of the Etowah County Commission?

A. Yes.

Q. Is that the correct title?

A. That's right, sir.

Q. All right. How long have you served as chairman of the county commission in Etowah County?

A. Eleven years and how many months? October will be twelve years. October 23rd, something like that, will be twelve years.

* * *

[p. 12] Q. What I really was asking you, Mr. Hitt, was this question: If there was a necessity to contract out

some road work in District Two, would that have to come before the entire commission for a vote?

A. Yes, sir.

Q. Or would the commissioner in District Two, with or without your assistance, have the authority to make that arrangement with the contractor?

A. We get bids on it. The commission would have to approve those contracts and the contract be awarded.

* * *

[p. 13] Q. During that same period of time we're talking about, now, pre-Dillard election, did the district commissioners or did the county commissioners have any responsibilities other than the responsibilities for the roads, bridges, highways, and maintenance and construction with respect to those things in their districts?

A. Of course, they attended the meetings. And [p. 14] they would make certain functions with me any time I needed them. They would come in and assist me in making a decision or talking over a problem that would arise and that they would have to vote on at a later time. But they would steer me in a lot of things. I asked them what their thoughts was because I did like to always do what the associates would - in a manner that they'd like to do it.

Of course, if it was within my power to control that, if I thought it right, I'd just mention to them I was going to do such and such and such, and they'd say go to it if you have the money. Never any dissention.

* * *

[p. 17] Q. Where does the – What sources of revenue are there for Etowah County for the road departments or for road maintenance?

A. We get gasoline tax from the state. We don't have a local gas tax, but oils and gasoline, diesel fuel, and the like, petroleum things, is [p. 18] all designated and must be spent on roads according to the laws of the State of Alabama.

Q. Is that gasoline tax called by a particular name in common usage?

A. We have RR money, which is resurface roads and so forth, pave roads. You can't use it for construction of roads or new pavement. We have the regular gasoline seven-cent gas tax, which we call it. And that is used for repairing bridges, keeping the roads open, resurfacing new roads and cutting the right-of-ways. That can be done on some RR money because it is maintaining on federal roads. But I don't really think the RR money enters too heavily on the cutting of grass.

Q. Is there also a four-percent gas tax?

A. Four-cent gas tax.

Q. Is that different from RR money and from the seven-cent tax?

A. Yes.

Q. Is that also a state tax?

A. That's state.

Q. State revenue that comes to you?

A. Yes.

Q. What is that used for?

[p. 19] A. Of that, seventeen percent of it goes to the City of Gadsden. Am I correct?

MR. FLOYD: Yes.

Q. Seventeen percent of the four percent gas tax revenues go to the city?

A. Seven cent.

Q. Of the seven cent.

MR. FLOYD: Seven and four.

Q. Both of them?

A. Really and truly it's both of them. I sign so many checks, about forty thousand a year, I can't keep up with them.

Q. Do I understand it correctly, Mr. Hitt, that the state sends to Etowah County a sum of money under the seven percent gas tax and also a sum of money under the four percent gas tax, and the City of Gadsden gets a percentage of that?

A. They get - what the law gives them as being a city and what is derived from their gasoline there in Gadsden. They also get seventeen percent of the county's money.

* * *

[p. 21] A. Some of the districts - Wait a minute. One district would get a little less, maybe, than the others.

That was District Three at that time. That had less road mileage.

* * *

Q. All right, sir. Does the entire commission – Prior to the 1986 election did the entire commission decide how to divide or how to apportion the gasoline tax and RR monies among the four road districts?

A. Yes, sir.

* * *

[p. 30] Q. Is it just a matter of taking the monies that the county knows is available or likely will be available from the gasoline taxes and RR money and dividing up in such way as they may agree?

A. They set a tentative budget. And I'm not sure at this time without going back in and checking it out. There is now existing what they call a full – just a big gasoline tax fund budget.

MR. FLOYD: Called common road fund.

Q. Common road fund?

A. Yes.

Q. If I were to look at the printed budget, would I find a line item for common road fund?

A. You'd have it in the budget, yes. It would be up there as to funds and so forth like that, naming it in a manner as prescribed by the state examiners.

Q. Okay. Would I also find in the county's budgets the way in which the common road fund was divided among the four districts?

A. No. You'd find in that budget what they had spent from that budget.

Q. I would find what each of the four road districts had spent from the common road fund?

[p. 31] A. Right.

* * *

Q. Let's say, for example, that Mr. McKee needs [p. 32] fifty thousand dollars to – for a road project in District Two, his district. How does he go about getting that?

A. Presents that request to the board.

Q. To the board, you mean –

A. So much money for such and such. And he offers that in the form [sic] of a motion.

Q. To the commission?

A. Yes. County commission. And they vote on it. And that money, then, if it's agreed upon, would come from that master fund over into his budget. Then he has that to spend on that particular –

Q. Do each of the four road commissioners have their own budget for their district?

A. Yes.

Q. For the road district?

A. Yes.

Q. Is there any way money gets into the account in those budgets other than by approval of the entire commission?

A. No, sir.

Q. Okay.

A. Majority of it. Has to be the majority of the vote.

* * *

[p. 69] Q. How would he go about getting road work done in District Five as a practical matter?

A. He would get the equipment and the men from that shop to do the work, what work they do in that particular district.

Q. How would he get paid for it?

A. Come out of that fund.

Q. Which fund?

A. The master fund or the large fund, one fund.

Q. I understood you to tell me that road monies went from the master fund or the common fund out to one of the four road departments. Is that not correct?

A. Actually the board, by action of the board, it [p. 70] will be voted out on paper. And the records will reflect it when it's done as spent, as the total amount.

* * *

Q. Would not be voted out into any budget that Commissioner Presley has, would it?

A. It would be voted out into the same manner, be used -

Q. How is he going to spend money if he doesn't have supervisory responsibility over any men or equipment or anything like that? I'm just trying to understand how it works.

A. Well, when he has paving, for instance, to do in his district that should be cleared by him as to what's done, the price of it and all. And if it's agreeable to him, they can proceed. [p. 71] And if it's cutting the grass and so forth, which is always a hurry-up thing, it's up to him whether he can accept the work done. It must be done according to his specifications, his wishes, his desires.

* * *

Q. It's your testimony that when the District Two road shop performs work for – in Coach Presley's district, District Five, that money is charged against the District Five budget?

A. That's right.

Q. Has that, in fact, been done since Coach Presley was elected to the commission? Has [p. 72] there been any road monies spent in District Five?

A. Yes.

Q. How much?

A. I don't know. I don't know without looking at the records.

* * *

[p. 82] Q. All right, sir. Now, when a person in charge of a particular department, whether it be maintenance departments of the courthouse, whether it be tax

assessor, tax collector or whatever, that person in charge of that particular operation, can he chose to spend money that is not located in the budget in a line item, can he spend it?

A. No.

Q. If he does, he's personally liable for it, isn't he?

A. That's right.

Q. Now, all the monies that are put in each one of those department budgets for salaries, fringe [p. 83] benefits, does that person in charge of that particular department have any discretion about how much he's going to pay each employee or how much fringe benefits that employee is going to have?

A. That is set by the personnel board.

Q. He has no discretion himself?

A. No.

Q. If he has a class six employee, then that class six employee is going to receive what the salary schedule calls for for all Etowah County employees?

A. That's true.

Q. He's going to receive the same and identical fringe benefits as every other Etowah County employees?

A. That's true.

Q. When a department head such as Mr. Presley, when he hires personnel for his particular department, is that governed by the personnel act of Etowah County?

A. Yes, sir.

Q. And does the hiring have to be done in a particular manner through the personnel department?

[p. 84] A. Yes, sir.

* * *

Q. All of these employees that work in the maintenance department, some fifteen in Etowah County, at the present time the supervisory [p. 85] commissioner in charge is Mr. Presley?

A. That's right.

Q. He has foreman and workers who do the actual work, does he not?

A. That's right.

Q. And those foreman [sic] report to him when they need direction or policymaking things to do in their departments?

A. Supposed to.

Q. So he is the overseer of that operation?

A. That's right.

Q. Each of the commissioners, One, Two, Three, and Four, are supervisory persons over certain road shops in Etowah County?

A. Yes, sir.

Q. And they have the same authority that Mr. Presley has on firing or discharging or paying of employees, don't they?

A. Yes, sir.

Q. Do you know how many employees or approximately how many employees each road shop has?

A. I'd have to just give you an approximate

Q. Do any of them have more than fifteen?

A. Not knowing today's figure, I'd say yes.

Q. One has over fifteen, doesn't it?

[p. 86] A. Yes, sir.

Q. That's District Two road shop?

A. Yes, sir. Had twenty there for a while.

Q. District Two is the one you've been referring to that's doing work in District Two and also in District Five?

A. Yes, sir.

Q. All right. Now, is it fair to say that the number of employees supervised by Commissioner Presley is equal in number or greater than the personnel supervised in certain road shops, three of the four road shops?

A. That's right.

Q. Now, does Etowah - as in budgets, by far what is the greatest item, line item, in each budget of each and every department of Etowah County?

A. The largest items is salary and fringe.

Q. Salary and fringe?

A. That's right. Personnel cost.

Q. And does Mr. Presley have some – withdraw that.

Does Etowah County have any county-wide sales tax or any monies coming from a sales tax to Etowah County?

A. No, sir.

[p. 87] Q. Do you have any special gasoline taxes, local gasoline tax?

A. No, we don't have a gasoline tax.

Q. Does the Etowah County Commission have any authority under law to impose any sort of sales tax or to obtain any additional revenues from any source without legislative vote and without a vote of the people?

A. No, sir.

Q. None. Right now are expenditures equal to or exceeding revenue?

A. To be honest with you, the income is not equal to the outgo. That's why we're borrowing money.

Q. Is that the reason for floating bond issues year after year?

A. Yes, sir.

* * *

[p. 90] Q. All right. Do you need five or six shops in Etowah County to operate and maintain the roads?

A. To operate these roads right now with the income which we have, it would be better to take the

income that we have and spend it on the roads rather than to build new shops.

* * *

[p. 91] Q. Mr. Presley's district, he has said, has got about six miles of county roads in it. Are the rest of the roads in the city limits of municipalities?

A. Yes, sir.

Q. Are those roadways maintained by those municipalities that are in the city limits?

A. Yes, sir.

* * *

[p. 92] Q. All right, sir. Now, if I had a road over in District Five and I were the commissioner of District Five, and I had a road in District Five that I wanted to get some additional [p. 93] paving on, would that normally be done by county employees?

A. Normally be done by contractor.

Q. Why would it be done by contractors?

A. County is not set up to do paving.

* * *

Q. What you're saying is from time is a contract or bid put out for paving - I'm talking about the regular asphalt paving - for bids, for competitive bids?

A. Yes.

* * *

[p. 94] Q. It doesn't designate the particular roads that are being paved?

A. No, no.

Q. All right. And so then the county commission determines what areas are to be paved with that under that contract?

A. Yes. Buying that type paving is done by footage or yard. There is occasion when a certain road is put out on contract and the amount and so forth.

Q. That's usual?

* * *

IN THE U.S. DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

ED PETER MACK, et al.,

Plaintiffs,

versus

RUSSELL COUNTY COMMISSION,

Defendants.

CIVIL ACTION
NUMBER
CV-89-T-459-E

DEPOSITION OF LAWRENCE PRESLEY

The deposition of LAWRENCE PRESLEY was taken before Cheryl T. Lee, as Commissioner, commencing at 10:00 a.m. on June 29, 1989, by the Defendants, at the law offices of Floyd, Keener, Cusimano & Roberts, Gadsden, Alabama, pursuant to the stipulation set forth herein.

* * *

[p. 23] Q. Are there any other roads where you have requested that road work be done and it has not been performed?

A. Yes.

Q. Let's talk about that. What other roads have you asked for work where there has been none as of yet?

A. 18th Street and Attalla, I think.

That adjoins District Three and District Two. And that's all.

Q. That all?

A. Uh-huh (indicating yes).

* * *

[p. 25] Q. Has any work been done on it at all?

A. No.

Q. Were these conversations you had with the commissioners on a one-to-one basis?

A. Yes. Well – yeah. Yeah. I never presented – Do you mean did I present it as a problem to [p. 26] the commission at a regular – duly authorized commission meeting?

Q. (Nods head affirmatively.)

A. No. I don't think so.

Q. So you never presented it at a formal commission meeting?

A. I don't think so.

Q. Did you ever propose a resolution about it at a formal commission meeting?

A. No. The reason – that's – let's not get into that. I don't think – no, I didn't.

* * *

[p. 32] Q. Are there people that live along the unpaved portions of these roads outside the city limits but in the county in your district?

A. No. No. Both instances, no houses in there.

* * *

[p. 35] Q. Well, specifically with respect to roads and bridges, what are your constituents not getting that others are getting?

A. I don't know.

* * *

[p. 38] Q. Okay. Now, of these fourteen thousand people who live in your district, do you know how many of them live outside city limits but in the county in your district?

A. Oh, no.

Q. Okay. Do you have a percentage, judgment, about the percentage of the people who live in your district that live outside the city limits but in your district in the county?

A. Very small percentage.

Q. Okay.

A. Three or four percent, I imagine, if that many.

Q. Than can I characterize your district as the vast majority of the people in your district live within city limits? Is that a fair statement?

A. Yeah, okay, within.

Q. And which city?

A. That's what I was going to say. Within which city limits? Gadsden, Attalla, Alabama City, a [p. 39] portion of Glencoe.

Q. And of this very small percentage in your district that lives outside of any city limits, this one to three

percent, do you know the racial breakdown of those people out in the county, outside the city limits?

A. No. Never had any reason to question that.

Q. Then this problem that you described to us here this morning isn't really a racial matter, is it?

MR. FALKENBERRY: Object to the form of the question.

A. Whether it's racial? I would be kind of hard pressed to answer that way, wouldn't I? Because I'm not taking into consideration any of the racial proportions. I didn't -

* * *

[p. 46] Q. Mr. Presley, is it your understanding that the gasoline tax monies are earmarked for roads and bridges, road repair, road maintenance, road construction?

A. According to the - I have not read the laws that much. But according to the words that are given, you know, statements that are given, yes.

[p. 47] Q. Okay. And that other monies that we commonly refer to as general fund monies are used for other purposes?

A. Yes.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

| | | |
|---------------------------|---|----------------|
| ED PETER MACK, et al., | * | |
| PLAINTIFFS | * | CIVIL ACTION |
| | * | NO. 89-T-459-E |
| VS: | * | |
| RUSSEL COUNTY COMMISSION, | * | |
| et al., | * | |
| DEFENDANTS | * | |

AFFIDAVIT OF BRUCE FOSTER, CLERK
SUBMITTED BY DEFENDANT ETOWAH
COUNTY COMMISSION

STATE OF ALABAMA
COUNTY OF ETOWAH

I, Bruce Foster, the Clerk of the Etowah County Commission, do depose and say as follows:

1. I am the duly appointed Clerk of the Etowah County Commission.

2. As such, I am familiar with the Resolutions, Books and Records of the Etowah County Commission and of Etowah County.

3. In 1986, as a result of redistricting litigation under the Voting Rights Act, Etowah County was divided into Six (6) Districts of approximately equal population.

4. One district, District Five (5), is comprised of a majority of black voters. Commissioner Lawrence Presley is the duly elected Commissioner of District Five (5), having been so elected in November, 1986, and having taken office in January, 1987.

5. Prior to redistricting, there were four districts, four commissioners and four road departments.

6. Subsequent to redistricting, a common road fund was created by Resolution dated August 25, 1987.

7. (a) District 1 has 140.35 miles of county road.

(b) District 2 has 201.78 miles of county road.

(c) District 3 has 265.14 miles of county road.

(d) District 4 has 241.00 miles of county road.

(e) District 5 has 2.60 miles of county road.

(f) District 6 has 35.22 miles of county road.

8. I maintain the books and records with respect to the expenditures of road funds per district. For computer record purposes, District 5 expenditures are reflected in District 2 printouts. However, I also keep manual records which reflect the expenditures in each district. According to my records, the following expenditures were made per district in 1987-1988:

(a) \$358,153.87 was spent on county roads in District One in fiscal year 1987-1988.

(b) \$338,759.09 was spent on county roads in District Two in fiscal year 1987-1988.

(c) \$533,986.69 was spent on county roads in District Three in fiscal year 1987-1988.

(d) \$261,955.40 was spent on county roads in District Four in fiscal year 1987-1988.

(e) \$21,355.60 was spent on county roads in District Five in fiscal year 1987-1988.

11. The following is a matrix of county road mileage per district, expenditures on county roads per district for fiscal year 1988, expenditure per mile, and unpaved county road mileage in Etowah County.

| | # Miles County Road | \$ Expenditure Fiscal Year 1987-1988 | \$ Expenditure Per Mile | # Miles Unpaved Road |
|------------|------------------------|--|----------------------------|-------------------------|
| District 1 | 140.35 | \$ 358,153.87 | \$ 2,551.86 | 10.49 |
| District 2 | 201.78 | \$ 338,759.09 | \$ 1,678.85 | 39.58 |
| District 3 | 265.14 | \$ 533,986.69 | \$ 2,013.98 | 27.43 |
| District 4 | 241.00 | \$ 261,955.40 | \$ 1,086.95 | 42.16 |
| District 5 | 2.60 | \$ 21,355.60 | \$ 8,213.69 | 1.35 |
| District 6 | 35.22 | \$ 38,868.70 | \$ 1,103.60 | 2.43 |

12. No Federal funds are used on roads except for those specific federal grants for specifically identified roads which are so identified directly in the grants.

13. Commissioner Presley individually oversaw the expenditure of \$311,719.50 in fiscal year 1987-1988, for courthouse maintenance and repair and oversaw the expenditure of \$328,521.00 in fiscal year 1989, for same.

14. Seventeen percent (17%) of the .07¢ and .04¢ gasoline tax money is distributed to the City of Gadsden for roadwork, maintenance and repair annually.

/s/ Bruce Foster
Bruce Foster

STATE OF ALABAMA
COUNTY OF ETOWAH

Personally appeared before me, the undersigned authority in and for said county and state, Bruce Foster, who after being first duly sworn deposes on oath and says that the facts contained in the foregoing affidavit are true and correct.

This the 28 day of March, 1990.

/s/ Betty K. Ballard
Notary Public

Exhibit F, page 2

FY 1989

| Dist | gasoline tax | gasoline tax | borrowed Courthouse Imp Fund Acc # 205 | borrowed General Imp Fund Acc # 204 | Total |
|-------------------|-----------------|-----------------|---|--|-------------|
| 1 | 208,358.75 | 159,278.75 | 107,500.00 | 55,000.00 | 530,137.50 |
| 2 | 208,358.75 | 159,278.75 | 107,500.00 | 55,000.00 | 530,137.50 |
| 3 | 208,358.75 | 159,278.75 | 107,500.00 | 55,000.00 | 530,137.50 |
| 4 | 208,358.75 | 159,278.75 | 107,500.00 | 55,000.00 | 530,137.50 |
| 5 | 0.00 | 0.00 | 0.00 | 0.00 | 0.00 |
| 6 | 0.00 | 0.00 | 125,000.00* | 0.00 | 125,000.00* |
| Engineering Dept | 323,465.00 | | | | 323,465.00 |
| Ferry | 69,000.00 | | | | 69,000.00 |
| Intergovernmental | 230,550.00 | | | | 230,550.00 |

* "Note" Act #205 Courthouse Imp Fund is money that was borrowed to get through FY 1988. It was not gasoline tax money. The only reason that dist # 6 rec 125,000.00 is because of grant of \$584,000 grant to install rip rap & guard rails on Whorton Bend Rd this is a 75%/25% match.

In The
Supreme Court of the United States

October Term, 1991

LAWRENCE C. PRESLEY, individually
and on behalf of others similarly situated,

Appellant,

vs.

ETOWAH COUNTY COMMISSION,

Appellee.

ED PETER MACK, and NATHANIEL GOSHA, III,
individually and on behalf of others similarly situated,

Appellants,

vs.

RUSSELL COUNTY COMMISSION,

Appellee.

On Appeal From The United States District Court
For The Middle District Of Alabama

BRIEF OF THE APPELLANTS

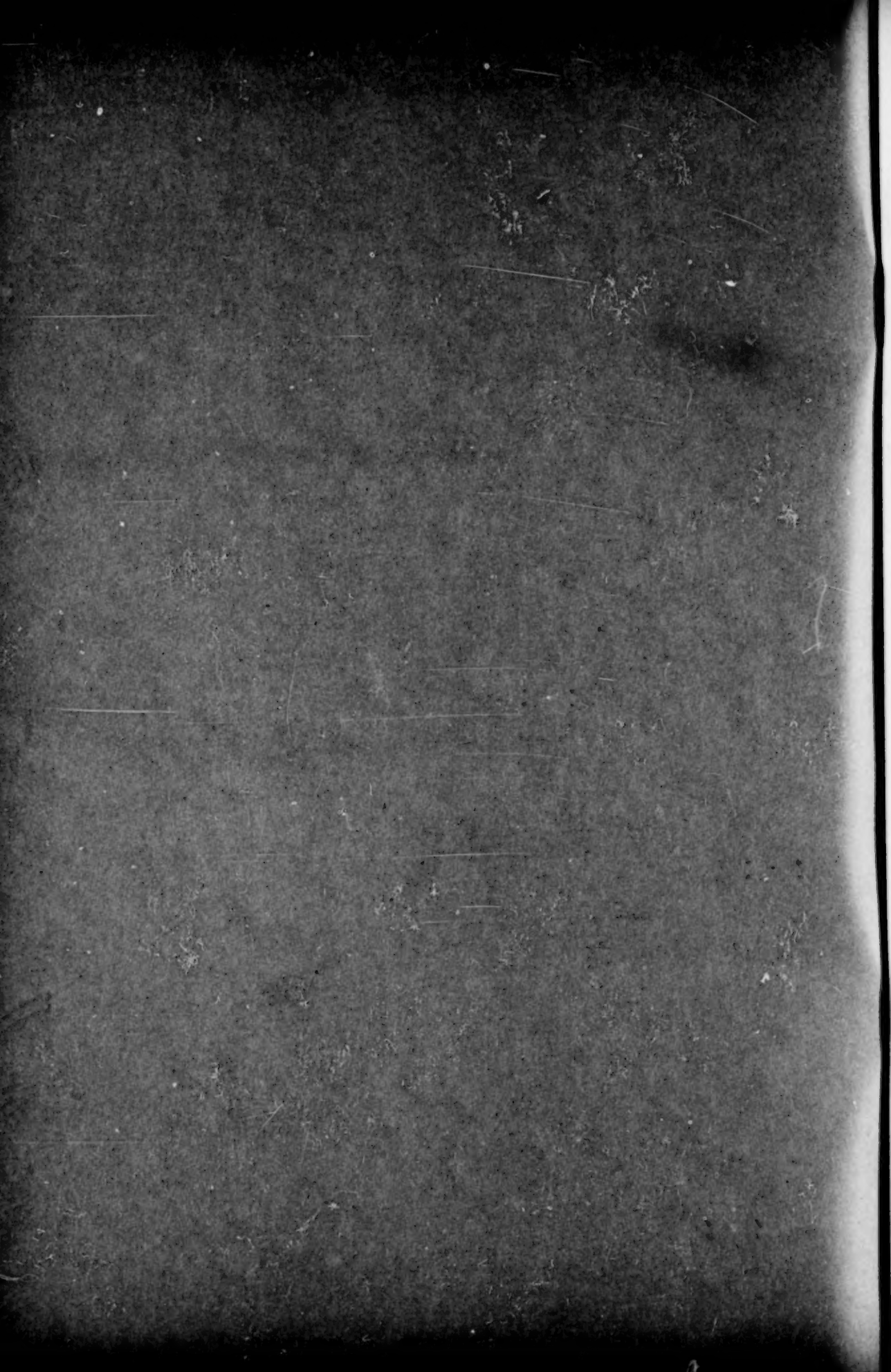
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July 1991



QUESTIONS PRESENTED

These consolidated cases present variations on the following basic question: What principles govern the power of local district courts to interdict the preclearance process under § 5 of the Voting Rights Act, 42 USC § 1973c, by ruling that particular changes are beyond the scope of the Act and need not be submitted for preclearance? The Act reserves to the U.S. District Court for the District of Columbia and/or the Attorney General of the United States plenary authority to determine whether changes affecting voting violate § 5. Local district courts are limited in § 5 cases to determining whether particular changes are within the scope of the Act and to enjoining voting changes that have not received the required preclearance.

1. Did the Alabama district court improperly determine to be beyond the scope of § 5 a resolution or act which removes from individual county commissioners the power independently to manage road and bridge work in each commissioner's respective district and places that power in the hands of either the entire seven-member commission or a county engineer appointed by the entire commission?

2. Did the Alabama district court impermissibly confuse substantive questions of § 5 violation with questions about the scope of statutory coverage when it held:

QUESTIONS PRESENTED – Continued

a. that reallocations of authority of elected officials "will normally have to be shown to involve officials with different voting constituencies" before § 5 preclearance is required;

b. that a change in the authority of individual county commissioners need not be submitted for § 5 preclearance if it is "insignificant in comparison" to the county commission's authority over other matters; and

c. that, even though an unprecleared 1979 law now shows an obvious potential for discrimination, it need not be submitted for § 5 preclearance?

3. Did the Alabama district court overstep its limited statutory authority by refusing to defer to determinations by the U.S. Attorney General that the changes in question do fall within the scope of § 5 of the Voting Rights Act and thus should be submitted for preclearance?

PARTIES IN COURT BELOW

The parties in the court below at the time of the judgment were plaintiffs Ed Peter Mack, Nathaniel Gosha, III, Lawrence C. Presley, and defendants Russell County Commission and Etowah County Commission.

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OPINIONS BELOW

The opinion of the district court is unreported. The opinion of the district court is reproduced beginning at JS A-1. The order denying the motion to alter or amend the judgment is reproduced beginning at JS A-42.¹

JURISDICTION

The district court denied the requested injunction on 1 August 1990 and denied the motion to alter or amend the judgment on 21 August 1990. The appellants filed their respective Jurisdictional Statements in this Court on 26 October 1990. This appeal is taken under 28 USC § 1253.

STATUTORY PROVISIONS

Section 5 of the Voting Rights Act of 1965 (42 USC § 1973c) is reproduced beginning at JS A-45. The Road Supervision Resolution and the Common Fund Resolution, adopted by the Etowah County Commission, are reproduced at A-48 and A-50, respectively, in the *Presley* Jurisdictional Statement. Alabama Act 79-652 is reproduced beginning at A-48 in the *Mack* Jurisdictional Statement.

¹ Unless otherwise noted, references to "JS" may be found in either Jurisdictional Statement at the cited page.

STATEMENT OF THE CASE

In 1964 the practice in both Etowah County and Russell County was that (1) the County Commission was elected at-large from residency districts; (2) the County Commission as a whole adopted a budget that divided the various road and bridge funds among the county commissioners in approximately equal amounts;² (3) each commissioner had a free hand to determine the priorities of road and bridge repairs in his or her district; and (4) each commissioner oversaw the work of his or her own road crew. The two enactments in question here change the manner of sharing political power on the commission from one in which each member controlled a portion of the budget, with which he or she could satisfy constituent demands for road repairs, to a system that gives the white majority effective control over every decision concerning the road and bridge system.

Presley v Etowah

The Adoption of Single-Member Districts

Before 1986, Etowah County was governed by four commissioners elected at large from residency districts plus a chair elected at large. In 1986 the United States District Court in the Middle District of Alabama found that Alabama's general at-large statute applicable to

² Under Alabama law, many taxes are earmarked for the support of particular governmental functions. In these counties the principal sources of funds for the repair and construction of roads and bridges were the "7¢ gas tax" and the "Three-R tax."

Etowah County Commission (and several others) was invalid under § 2 of the Voting Rights Act of 1965³ because the legislation had adopted and amended the statute with a racially discriminatory purpose.⁴ To remedy unlawful dilution of black voting strength caused by the prior at-large election system, later that year the Court approved a consent decree providing for the enlargement of the Etowah County Commissioners from five members elected at large to six members elected from single-member districts.⁵ The consent decree divided the County into six districts, with the single-member district elections held over a four-year period, as the terms of the incumbents expired.⁶ Paragraph 3 of the *Dillard* consent decree provided:

³ Section 2 of the Voting Rights Act of 1965, 42 USC § 1973, provides in pertinent part:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial of abridgment of the right of any citizen of the United States to vote on account of race or color

⁴ *Dillard v Crenshaw County*, 640 FSupp 1347, 649 FSupp 289 (MD Ala 1986).

⁵ *Dillard v Crenshaw County*, CA No. 85-T-1332-N (MD Ala, 12 November 1986). The Commission has been expanded to seven members until 1993, to allow the at-large chairman to complete his term.

⁶ Districts 5 and 6 were the only ones to elect representatives in the special, court-ordered elections in December 1986. Commissioners Presley and Williams took office in January 1987. Single-member district elections were held in Districts 2 and 3 in the regular 1988 elections, and in Districts 1 and 4 in 1990. All the Old four were re-elected.

When the District 5 and 6 Commissioners are elected in the special 1986 election, they shall have all the rights, privileges, duties and immunities of the other commissioners, who have heretofore been elected at-large, until their successors take office.

New District 5 is the only district that is majority black. Plaintiff Presley, who is black, was elected by the voters of District 5 in a special election in December 1986; Billy Ray Williams, who is white, was elected from District 6. All five of the pre-1986 incumbent commissioners were white. According to the 1990 Census, the population of Etowah County is 13.8% black.

The Former System for Road Work

Under the at-large election system, the commissioners met one day a week to carry out the few legislative responsibilities they had as a body. During the other 90 percent of their official time, they were physically present in their respective districts running their respective road and bridge operations. Hitt Depo. at 10-11.⁷ The chair was the only commissioner who worked at the courthouse. The chair managed the courthouse buildings and grounds and supervised the financial records but had no part in the road and bridge operations. Hitt Depo. at 15, 24.

The four associate commissioners were "road" commissioners; their residency districts were administrative

⁷ The case was submitted to the three-judge court on depositions and exhibits, so there is no formal transcript of a trial.

"road" districts, and each had virtually unfettered authority to run the road and bridge operations in his district (all Etowah County commissioners have been males). Each road commissioner had sole management authority over all construction and repair of roads, bridges and the like in his district, including equipment, employees, and road subcontracts. Hitt Depo. at 10-11. Each commissioner had a shop in his district and controlled his own budget; road and bridge funds were divided equally among the four road districts. Hitt Depo. at 20-25. Some decisions such as contracts had to be approved by the entire commission, but the commission always deferred to the choices of the commissioner in whose district the work would be performed, according to the testimony of Chairman Hitt. JA 54. Chairman Hitt had lost his supervisory powers over the road and bridge budget as a result of a local act passed in 1985. Hitt Depo. at 17, 20.

The construction and maintenance of roads and bridges is the one area of county government over which the county commission has effective political discretion. The commission has no taxing authority. JA 64. It is completely dependent on revenues established by state law and mostly received from state agencies. JA 55-57. A review of the county's budget shows that virtually all the general fund and all other special funds are dedicated to predetermined spending requirements and/or are controlled by other elected officials, such as the sheriff, the probate judge, tax assessor, etc. E.g., Pl. Ex. L.

The Reaction of the Incumbents to the New Commissioners

When the District 5 and 6 commissioners took their seats in January 1987, the four incumbent at-large commissioners ("the Old Four") refused to yield any of their road and bridge powers, notwithstanding the requirement of the *Dillard* decree. The Old Four continued to operate as though there were no new members of the commission. The Old Four agreed on the road and bridge budget among themselves and submitted it directly to the county clerk, Commission Chairman Hitt testified. Hitt Depo. at 29. They informed the new members (by a "To Whom It May Concern" letter) that the commissioners for Districts 1 through 4 "agree to do the maintenance on all the county roads in District 5 and District 6. . . ." Pl. Ex. Y.⁸ In effect, the Old Four commissioners banished Presley, Williams, and Chairman Hitt to political limbo. Chairman Hitt testified that Presley was left with no administrative duties at all. Hitt Depo. at 74.

The 1987 Resolutions

The Old Four formalized their monopoly over road and bridge operations in the resolutions at issue in this action, adopted 25 August 1987. One resolution ("the Road Supervision Resolution"), adopted over the objections of the new commissioners, provides that each of the Old Four commissioners "shall oversee and supervise the

⁸ The case was submitted to the district court on depositions and exhibits, so there is no record citation to the introduction and admission of exhibits as usually required by Supreme Court Rule 24.5.

road workers and the road operations assigned to the road shop[s] located in District 1[, 2, 3, and 4]" and "shall jointly oversee, with input and advice of the County Engineer, the repair, maintenance and improvement of the streets, roads and public ways of all of Etowah County." Road Supervision Resolution, ¶¶ 1-4, and 7 (JS A-48). The resolution used the numbers of the old rural districts, even though one of the road shops is now located in Presley's District 5. That resolution assigned Commissioner Presley to "oversee and supervise maintenance employees and the repair, maintenance and operation of the Etowah County Courthouse" and the other new commissioner to "oversee and supervise the employees of the Engineering Department of Etowah County and the operations of that department." Road Supervision Resolution, ¶¶ 5 and 6 (JS A-48). It further directed the two new commissioners to "jointly oversee the maintenance and operations of the Etowah County Farmers Market." Road Supervision Resolution, ¶ 8 (JS A-48). Even though one of the four road shops is now physically located in the majority black district represented by appellant Presley, the District 2 commissioner continues to supervise it.

The second resolution ("the Common Fund Resolution"), also adopted over the objections of Presley and Williams, formalized the control of the Old Four commissioners over the entire road and bridge budget. Continuing the pre-resolution and pre-*Dillard* practice of allocating the road and bridge budget equally among all commission districts would have required six shares instead of four. So the Old Four resolved to discontinue formal allocation of the budget among the districts. They

instituted a new common fund that the Old Four would control jointly, as a formal matter, and that they could reallocate among themselves informally.

[A]ll monies earmarked and budgeted for repair, maintenance and improvement of the streets, roads and public ways of Etowah County [shall] be placed and maintained in common accounts, not be allocated, budgeted or designated for use in districts, and [shall] be used county-wide in accordance with need,

Common Fund Resolution, ¶ 1 (JS A-49). This second August 1987 resolution made the Old Four's monopoly explicit by assigning control of the road work to "the road workers of Etowah County operating out of the four present road shops located in the County." Common Fund Resolution, ¶ 2 (JS A-49). The remnants of the formal allocation of the road and bridge budget among Districts 1-4 were retained in a grandfather clause, which preserved the control of each at-large incumbent over any unspent FY 1986-87 monies in his road district budget. Common Fund Resolution, ¶ 3 (JS A-49).

Each September when the commission adopts the annual county budget, the "no" votes of Presley and Williams have no effect whatsoever on the Old Four's plans for road and bridge operations. Pl. Exs. Q, M and L. The Old Four make up the road and bridge budget among themselves, send it directly to the county clerk bypassing the Chairman and District 5 and 6 commissioners, and then vote their budget through with their solid, four-vote majority. JA 58; Hitt Depo. at 29, 32-34; Pl. Exs. Q, M, and L. Informally, the Old Four continue the old practice of allocating control over equal shares of the road and bridge budget among themselves. JA 76-77.

The Old Four divided \$1.4 million among their four districts in FY 1987, \$1.9 million in FY 1988, and \$2.1 million in FY 1989. JA 76. Each of the Old Four has virtually unfettered authority over his one-fourth of the road and bridge budget. Each decides how the money is to be spent, whom to hire, whom to promote, and with whom to contract. JA 58-59; Hitt Depo. at 32, 63, 68-69; Presley Depo. at 10-11. The county clerk continues to report the amount of road and bridge funds spent in each of the four former districts, with no road and bridge expenditures in Districts 5 and 6. The District 5 and 6 commissioners must come, hat in hand, to one of the Old Four to plead their case for road work within their districts. Hitt Depo. at 71; Presley Depo. at 23-32.

The Present Suit

Commissioner Presley, representing a class of black citizens in Etowah County, sued to enjoin the enforcement of the two resolutions unless they were precleared under § 5 of the Voting Rights Act.⁹ A three-judge district

⁹ Appellants Presley, Mack, and Gosha and William America (Escambia County commissioner) had earlier brought suit under § 2 of the Voting Rights Act and Title VI of the Civil Rights Act of 1964. Presley claimed that the two Etowah county resolutions were being administered in a discriminatory way. Mack and Gosha claimed that the county unit plan in Russell County was being administered in a discriminatory way. Later, when they discovered that the resolutions and the change to the county unit plan had not been submitted for preclearance, they amended their complaint to ask for relief under § 5. Their other claims (under § 2 of the Voting Rights Act) are still pending in the district court. Commissioner America dismissed his claims against Escambia County.

court issued an injunction against only the Road Supervision Resolution. The district court held that "the potential for discrimination posed by" the Road Supervision Resolution "is blatant and obvious;" that the "resolution stripped the voters in districts 5 and 6 of any electoral influence over . . . commissioners" responsible for road management, JS A-20. It therefore enjoined the enforcement of the Road Supervision Resolution unless Etowah County obtained preclearance of it within 60 days, JS A-28. Etowah County has not submitted the Road Supervision Resolution to the Attorney General or the District Court for the District of Columbia.

The district court, in a split opinion, held that Etowah County did not need to submit the Common Fund Resolution for preclearance for the following reasons:

It is true that the reallocation of authority embodied in the common fund resolution involved officials with different voting constituencies. . . . We conclude, however, that the reallocation of authority embodied in the common fund resolution was, in practical terms, insignificant in comparison to the entire Commission's authority, both before and after the disputed change, to allocate funds among the various districts, and thus to effectively authorize or refuse to authorize major road projects on the basis of a county-wide assessment of need.

JS A-18-19. One district judge dissented from this conclusion, JS A-32 *et seq.* Judge Thompson focused on the way in which the commissioners actually used their powers and concluded, "A commissioner's real authority lies . . . in how those funds are used after they are allocated."

JS A-32. The district court unanimously agreed that the Road Supervision Resolution should be enjoined unless it were submitted for preclearance. JS A-20-21 and A-27.

Mack v Russell County

Alabama Act 79-652 transferred from the Russell County Commissioners to the Russell County Engineer all functions, duties, and responsibilities for roads, highways, bridges, and ferries. This centralized control is called "the unit system" in Alabama. Before the Act passed, each commissioner had controlled the road work in his or her own district.

Despite its transfer of important governmental functions from the supervision and control of elected county commissioners to the (appointed) county engineer, neither the County Commission nor any State official submitted Act 79-652 for preclearance. The Department of Justice made a written request in 1989 that it be submitted. When the County refused to do so, the appellants Mack and Gosha brought this action.

At the time the 1979 act was adopted, the Russell County Commission consisted of five commissioners elected at large from four residency subdistricts; three rural districts had one commissioner each and Phenix City (the largest city in the county) had two seats on the commission. The commissioners residing in the rural districts exercised exclusive discretion and control over the road shops, road equipment, materials, expenditures and employees in their respective districts. Each commissioner was responsible for maintaining a county workshop and for maintaining a road crew. Belk Depo. at 18;

Adams Depo. at 16. Before the adoption of the unit system, each "commissioner had a road crew that he was in charge of and that he - even though he had a foreman, you know, he made the assignments and pretty generally called the shots on what work was done and where and so forth." Adams Depo. at 11. Former Representative Charles Adams was the primary sponsor of Act 79-652.

Each commissioner also controlled hiring, firing, and assignment of personnel in his or her road shop. Belk Depo. at 12. This amounted to substantial employment authority, because the road and bridge system is a major employer in Russell County government. Adams Depo. at 22. Road and bridge expenditures represent the majority of the county's budget and of public monies over which the county government exercises discretionary authority. The budget of the county engineer is \$1.8 million. McGill Depo. I at 18. Before implementation of Act 79-652, appropriations from the budget were made on the basis of road and bridge districts. McGill Depo. I at 18, 19, 22.

In May 1979, the Russell County Commission adopted a resolution that placed all county road construction, maintenance, personnel and inventory under the supervision of the County Engineer and requested the Russell County legislative delegation to enact this change as law. Def. Ex. 1, Belk Depo. In July 1979 the Alabama Legislature passed Act 79-652, which converted the process for governing the road and bridge budget and operations to a "unit system." The Act provides:

All functions, duties and responsibilities for the construction, maintenance and repair of public roads, highways, bridges and ferries in Russell

County are hereby vested in the county engineer, who shall, insofar as possible, construct and maintain such roads, highways, bridges and ferries on the basis of the county as a whole or as a unit, without regard to district or beat lines.

The Russell County Commission is now composed of seven commissioners elected from single-member districts, under a consent decree entered 17 March 1985, in *Sumbry v Russell County*, CA No. 84-T-1386-E (MD Ala). The decree provided for elections from single-member districts beginning in 1986 and was designed to remedy unlawful dilution of black voting strength caused by the prior at-large election system. Nathaniel Gosha, III, and Ed Peter Mack, the first black county commissioners in Russell County history, were elected in 1986 from Districts 4 and 5, respectively, each of which has a black voter majority. According to the 1990 Census, the population of Russell County is 38.6% black.

Commissioners Mack and Gosha (appellants in this Court) petitioned the district court for an injunction to restrain appellee Russell County Commission from implementing Act 79-652, unless the statute receives preclearance under § 5 of the Voting Rights Act, 42 USC § 1973c.¹⁰ The district court ruled Russell County did not have to submit Act 79-652 for preclearance. JS A-16-18. Judge Thompson dissented, partly on the grounds that the at-large commissioners were *de facto* accountable to the voters in their respective districts. Thus, he argued, there had been a shift of responsibility from district commissioners to an appointed at-large official. JS A-34-35.

¹⁰ See footnote 9.

ARGUMENT

SUMMARY OF ARGUMENT

Section 5 of the Voting Rights Act of 1965 prohibits a covered State or locality from implementing any change in its standards, practices, or procedures with respect to voting until it obtains preclearance – that is, a determination that the proposed change has neither the purpose nor the effect of denying or abridging the right to vote on account of race – from the Attorney General of the United States or the District Court for the District of Columbia. The purpose of § 5 was “to shift the advantage of time and inertia from the perpetrators of the evil to its victims,” *South Carolina v Katzenbach*, 383 US 301, 328 (1966).

A local three-judge district court must determine only whether the voting change in question has a “potential for discrimination.” *Dougherty County Board of Education v White*, 439 US 32, 42 (1978). This Court intended for local district courts to limit their inquiry to the nature of the voting-law change, not to search for discrimination in the circumstances of the particular factual situation.

Congress drafted § 5 to centralize consideration of the substantive preclearance issues in two fora: the District Court for the District of Columbia and the Attorney General. To reverse the time-consuming, expensive, and legally burdensome case-by-case method of challenging proliferating changes in voting practices case by case, Congress also placed all the burdens of proof and delay on the covered jurisdictions. The district court below fundamentally frustrated this statutory enforcement scheme and exceeded its jurisdiction by engaging in substantive consideration of the merits of the changes in

question and placing the burden of proof on the private plaintiffs.

The district court below acknowledged that " 'reallocation[s] of authority' among government officials or bodies *may* constitute changes affecting voting under section 5." JS A-10 (emphasis added). The district court should have proceeded no further once it found that the changes at issue had "the *nature* of the changes in election practices . . . which required preclearance. . . ." *McCain v Lybrand*, 465 US 236, 250 n.17 (1984) (emphasis added). *Every* change affecting voting is required by statute to receive preclearance, even one that seems innocent of discriminatory purpose or effect. Only the D.C. District Court and the Attorney General are empowered to declare the change free of discrimination. The District Court foreclosed that consideration.

The changes in this case reallocate significant power from each commissioner to the whole commission (acting by majority vote) or to an official appointed by the whole commission. This Court has held that such power reallocations must be submitted for preclearance under § 5. *Allen v State Board of Elections*, 393 US 544 (1969); *McCain v Lybrand*, 465 US 236 (1984).

The reasons cited by the Alabama district court for refusing to require Section 5 preclearance of the challenged changes went beyond the narrow question of the Act's scope and impermissibly involved the local court in substantive issues of whether violations exist: (1) the Russell County change affected officials responsible to the same electoral constituency; (2) one Etowah County

change seemed relatively insignificant to the court majority; and (3) even though the Russell County change has an obvious discriminatory impact today, the potential for discrimination would not have been as obvious in 1979 when the law was enacted. The district court's analyses were wrong even as matters of substantive law. But these are questions Congress has reserved exclusively for the District of Columbia court and the Attorney General, and the Alabama district court exceeded its statutory authority even by considering them.

The district court should have accorded deference to the decision of the Attorney General that the changes in this case must be submitted under § 5. This Court has held that the Attorney General's decisions on coverage of the Act are entitled to great deference and has specifically relied upon the Attorney General's decisions to apply § 5 to certain election-law changes. *United States v Sheffield Board of Comm'rs*, 435 US 110 (1978); *NAACP v Hampton County Election Commission*, 470 US 166, 179 (1985); *Dougherty County Board of Education v White*, 439 US 32, 39 (1978); *Perkins v Matthews*, 400 US 379, 390-94 (1971).

The Russell County Commission had changed to a "unit system" in 1979, but had never submitted the change for preclearance. In 1985 the Commission changed from at-large elections to single-member districts. In assessing the 1979 unprecleared change, the court below looked only at the conditions immediately "before and after the 1979 change," JS A-21, when the county commission was still elected at large. In *City of Rome v United States*, 446 US 156 (1980), this Court explained that when a change is not submitted until years after its enactment, the change is to be analyzed in light of the now-existing

system rather than in light of the system existing at the time the unprecleared change was enacted. The Justice Department regulations are to a similar effect. 28 CFR § 51.54(b).

- I. **The district court misapplied the "potential for discrimination" test and decided the substantive issues reserved for the Attorney General or the District Court for the District of Columbia.**

Section 5 of the Voting Rights Act of 1965 prohibits a covered State or locality from implementing any change in its standards, practices, or procedures with respect to voting until it obtains from the Attorney General of the United States or the District Court for the District of Columbia a determination that the proposed change has neither the purpose nor the effect of denying or abridging the right to vote on account of race.¹¹ "The legislative

¹¹ Section 5 of the Voting Rights Act of 1965, 42 USC § 1973c, provides, in pertinent part:

Whenever a [covered] State or political subdivision . . . shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, . . . such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, . . . and unless and

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history [of § 5] on the whole supports the view that Congress intended to reach any state enactment which altered the election law of a covered State in even a minor way." *Allen v State Board of Elections*, 393 US 533, 566 (1969).

A. The "potential for discrimination" test looks to the nature of the change in the voting law, not to its particular circumstances in the jurisdiction.

Under the § 5 case law, a local district court must determine only whether the voting change in question has a "potential for discrimination." *Dougherty County Board of Education v White*, 439 US 32, 42 (1978). If such a potential exists the local court's responsibility is at an end: it must simply enjoin the practice; it cannot determine whether the potential has been realized. In this case the district court improperly used the "potential for discrimination" standard as an inquiry into the plaintiffs' likelihood of success on the merits.

This Court's decisions on "potential for discrimination" reveal that it intended the local district courts make an inquiry into the nature of the voting-law change, rather than into the circumstances of the particular factual situation. This Court first used the "potential for discrimination" rubric in *Dougherty*, 439 US 32, 42 (1978):

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until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure

"Thus, in determining if an enactment triggers § 5 scrutiny, the question is not whether the provision is in fact innocuous and likely to be approved, but whether it has a *potential* for discrimination." The first clause of that formulation negates any inquiry into the eventual outcome of the preclearance process. The Court made this point even more forcefully by the cases it cited in support of its proposition: *Georgia v United States*, 411 US 526, 534 (1973); *Perkins v Matthews*, 400 US 379, 383-385 (1971); *Allen v State Board of Elections*, 393 US 544, 555-556, n 19, 558-559, 570-571 (1969). See, *Dougherty*, 439 US at 42.

In *Georgia v United States*, the Court held that redistricting – by its *nature*, without regard to its particular circumstances – possesses a potential for discrimination.

The *Perkins* Court approvingly quoted the originating district judge in the case on the role of the local three-judge district court:

The only questions to be decided by . . . the three judge court to be designated, is whether or not the State of Mississippi or any of its political subdivisions have acted in such a way as to cause or constitute a voting qualification or prerequisite to voting or standard, practice or procedure with respect to voting within the meaning of the Voting Rights Act of 1965, which changed the situation that existed as of November 1, 1964

Perkins, 400 US at 384. The *Perkins* Court expanded on this point by holding that the local district court may not consider

what Congress expressly reserved for consideration by the District Court for the District of

Columbia or the Attorney General – the determination whether a covered change does or does not have the purpose or effect “of denying or abridging the right to vote on account of race or color.”

Perkins, 400 US at 385.

In *Allen* the Court held that a change from district to at-large voting could effect a dilution of voting power; that a change from election to appointment for an office “could be made either with or without a discriminatory purpose or effect;” that increasing the requirements for independent candidates to gain a ballot position has a “substantial impact” on voting; and that a new procedure for casting write-in votes “is different from the procedure in effect when the State became subject to the Act.” *Allen*, 393 US at 569-570. This Court did not, however, determine for itself whether the Mississippi and Virginia changes at issue in *Allen* and its companion cases were in fact discriminatory; that job was properly left, in the first instance, to either the Attorney General or the District Court for the District of Columbia.

In summary, these cases looked to whether the type of change might cause dilution of the black vote somewhere under some circumstances. If it is possible for the local court to hypothesize some circumstances under which the change might cause dilution, then the jurisdiction cannot avoid the simple burden of submitting its election-law change to the Justice Department or District Court for the District of Columbia.

Since the purpose of § 5 was “to shift the advantage of time and inertia from the perpetrators of the evil to its victims,” *South Carolina v Katzenbach*, 383 US 301, 328

(1966), the meaning of the holding in *Dougherty* becomes clear. The plaintiffs need only show that the enactment is of a type that *could be* discriminatory. The plaintiff is not required to show that the new enactment actually is discriminatory; if that were the standard, every § 5 enforcement proceeding would be turned into a § 2 case.

In these cases, if the district court had looked only at the nature of the changes, rather than at possible justifications for the changes, the district court would have concluded there was a potential for discrimination in the following ways:

(1) Just as the voting power of the black electorate is submerged when at-large elections are used where there is racially polarized voting,¹² the change from a district road system to a unit system may dilute the voting power of a black electorate concentrated in a single district. In an at-large election, blacks may be unable to elect representatives of their choice; if the county adopts single-member districts for elections and a unit system for road work, black voters may be unable to have their elected representatives carry out the policies desired by the black electorate.

(2) Changing from individual district decisions to group (i.e., commission) control over all decisions submerges the political power of the district constituency by making such decisions dependent upon the votes of six

¹² For this reason a change from district to at-large elections must be precleared. *Allen*, 393 US 544.

commissioners, five of whom were not answerable to the voters in the particular district.¹³

(3) If a minority group was able to turn to one sympathetic person on a county commission, and the commissioner was able to respond to the minority's particularized needs, a change to group decision making would submerge the power of that commissioner, without regard to the method of election of commissioners.

(4) Under district-based decisions, individual commissioners could use their road budgets to bargain with other commissioners for constituent services of all sorts. The change to group-based decision making changes that balance of power, so that the commissioners representing black voters have no bargaining power unless the commissioners of the white districts are divided on an issue. As Justice Scalia, joined by the Chief Justice and Justices O'Connor and Kennedy, recently noted in his dissent,

Patronage, moreover, has been a powerful means of achieving the social and political integration of excluded groups. . . . The abolition of patronage, however, prevents groups that have only recently obtained political power, especially blacks, from following this path to economic and social advancement.

¹³ The last three aspects of the appropriation and expenditure process can also be found in the block grant programs of the federal government. Under such programs a fund of money is divided among the several States, with each State deciding how the money is to be spent within that State. The recipient of the block grant (a State or one commissioner) has the freedom to respond to local constituents in deciding how to spend the block grant within the State or commission district.

Every ethnic group that has achieved political power in American cities has used the bureaucracy to provide jobs in return for political support. It's only when Blacks begin to play the same game that the rules get changed. Now the use of such jobs to build political bases becomes an "evil" activity, and the city insists on taking control back "downtown."

Rutan v Republican Party of Illinois, __ US __, 111 LEd2d 52, 88 (1990) (citations omitted).¹⁴

This case is about an analogous form of political power: the ability of commissioners to act with relative autonomy within their own districts so they may provide services useful to their black constituents, but which a white-majority commission or county engineer may not provide to black constituents.

B. Congress drafted § 5 to centralize consideration of substantive issues in two fora: the District Court for the District of Columbia and the Attorney General.

Congress has given a "substantial" watchdog responsibility to the U.S. District Court for the District of Columbia and the Attorney General of the United States to ensure that covered jurisdictions do not implement changes affecting voting unless and until state or local

¹⁴ Zora Neale Hurston, an African American writer, made the same point in one of her novels: "Yo' common sense oughia tell yuh de white folks ain't goin' tuh 'low [a colored man] tuh run no post office." Zora Neale Hurston, *Their Eyes Were Watching God* 37 (First Perennial Library ed. 1990).

officials demonstrate they are free from discriminatory purpose or effect. The Section 5 preclearance process "is perhaps the most stringent . . . and certainly the most extraordinary" of the new remedies adopted by Congress in 1965 "to 'banish the blight of racial discrimination in voting' once and for all." *McCain v Lybrand*, 465 US 236, 244 (1985), quoting *South Carolina v Katzenbach*, 383 US 301, 308 (1966). For the express purpose of radically reversing the time-consuming, expensive, and legally burdensome method of challenging proliferating changes in voting practices case by case, Congress designed a novel preclearance procedure that was supposed to place all the burdens of proof and delay on the covered jurisdictions. *McCain v Lybrand*, 465 US at 243-44. The sheer number of such changes and the recalcitrance of covered jurisdictions, which have failed or refused even to submit many changes for preclearance, has seriously strained the Attorney General's limited resources.

This Court recently acknowledged that the Attorney General cannot and usually does not monitor each jurisdiction to make sure all changes affecting voting are being submitted for preclearance. *Clark v Roemer*, 59 USLW 4583, 4586 [slip opinion at 11-12] (June 3, 1991). Consequently, private citizens have been forced into the role of policing covered jurisdictions simply to get changes submitted under Section 5 and to prevent their implementation prior to preclearance. Private litigants must turn to the local federal district courts for this limited, threshold enforcement function. *Allen v State Board of Elections*, 393 US 544 (1969).

Local district courts who overstep their narrowly restricted roles in Section 5 actions "upset[] this ordering

of responsibilities under § 5[,] diminish covered jurisdictions' responsibilities for self-monitoring under § 5 and . . . create incentives for them to forgo the submission process altogether." *Clark v Roemer*, 59 USLW at 4586 [slip opinion at 11-12]. The district court's rulings in the instant cases encourage covered jurisdictions to give themselves the benefit of the doubt about the need to preclear changes in the powers of government officers. Even requests for submission by the Attorney General can be ignored with impunity. Private citizens will have to institute three-judge court actions and bear the burden of convincing local district judges that something approaching a likelihood of significant discrimination exists before the covered jurisdictions need begin the preclearance process. Meanwhile, the changes already will have been implemented, making it likely the local district court will permit implementation to continue during the preclearance process. See *Clark v Roemer*, 59 USLW at 4584 [slip opinion at 4].

As the majority opinion below demonstrates, the use by local district courts of the "potential for discrimination" inquiry is threatening to create a burgeoning new body of Section 5 caselaw, one that is largely independent of, but parallel to, the substantive principles developed by the decisions of the D.C. District Court and the decisions and regulations of the Attorney General. All three of the district judges below agreed that it is usually impossible to dissociate "potential for discrimination" inquiries, as they understand them, from substantive analyses of discrimination in fact. JS A-22 n.21 (majority opinion) and A-30 (Thompson, J., dissenting). Unless this Court acts decisively to stop it, most future developments

in Section 5 law will take place in local district courts, which lack jurisdiction to make substantive determinations about the nature or scope of violations. Private plaintiffs rather than covered jurisdictions bear the burden of proving discriminatory circumstances. Covered jurisdictions will be able to avoid bearing the burdens of time and inertia.

In *Houston Lawyers' Ass'n v Attorney General of Texas*, 59 USLW 4706 (June 20, 1991), this Court emphasized (in a § 2 context) the importance of separating "the threshold question of the Act's coverage" from substantive issues about whether a violation has occurred. *Id.* at 4708 [slip op. at 6]. See also *Chisom v Roemer*, 59 USLW 4696, 4698 [slip op. at 9] (June 20, 1991).¹⁵ Complex factual issues and policy considerations are properly reserved for plenary evidentiary proceedings to determine whether the Act has been violated. Engaging these issues at the threshold of coverage procedurally frustrates the broad remedial purpose of the Voting Rights Act. This is so particularly in the § 5 context, where Congress has explicitly restricted authority to determine violations to the D.C. District Court and the Attorney General, leaving local district courts with the limited responsibility of facilitating the work of the D.C. fora by requiring covered jurisdictions to submit all changes that may affect the voting rights of protected minorities.

Congress excluded local district courts from § 5's enforcement mechanism because it wanted to centralize

¹⁵ The question before the Court in *Chisom* involved only the scope of coverage of § 2, making it unnecessary to address the elements of proving a violation or providing a remedy.

in Washington a uniform body of case precedents. It also distrusted the ability of district courts in the covered jurisdictions to afford sufficient weight to the national voting rights priorities embodied in § 5's extraordinarily intrusive procedural and substantive measures.¹⁶ The institutional difficulties Congress feared in local courts are apparent in the split decision below. The majority below simply was unprepared to accept the plain language of § 5's sweeping command, reaffirmed by this Court's decisions, when it engaged in a balancing of the white community's "goodgovernment"¹⁷ agenda with the right of blacks to have effective and responsive representatives.¹⁸ The district court majority confessed that in

¹⁶ In *McDaniel v Sanchez*, 452 US 130, 151 (1981), this Court stated, "Because a large number of voting changes must necessarily undergo the preclearance process, centralized review enhances the likelihood that recurring problems will be resolved in a consistent and expeditious way." The next year, Congress rejected proposals to allow local district courts to hear § 5 suits. S. Rep. No. 417, 97th Cong., 2d Sess. 58-59 (1982); H.R. Rep. 227, 97th Cong., 1st Sess. 36 (1981). The Senate overwhelmingly rejected an amendment which would have allowed any "appropriate district court" to hear suits under § 5 of the Act. 128 Cong. Rec. S6977-6982 (1982).

¹⁷ Flannery O'Connor, "The Barber," in *The Complete Stories* 15, 20 (1971).

¹⁸ As examples of the district court's intrusion into the merits of the Russell County Commission's rationales for its changes, note the following: the district court majority held the potential for diminution of blacks' voting rights "pales," JS A-19, in comparison with legitimate local government reforms that discouraged "corruption in Russell County's road operations," JS A-3, that replaced political "horse-trading," JS A-19, with more efficient systems that "consolidated the road shops . . . and streamlined the road work force," JS A-4, and that

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balancing the concern of freeing covered jurisdictions from unnecessary federal interference against what this Court has called "the prophylactic purpose" of § 5,¹⁹ it was opposed to "automatically expanding, where in doubt, the scope of [§ 5] coverage" JS A-22 n.20.

When it drafted § 5 of the Voting Rights Act, Congress exercised its enforcement powers under § 5 of the Fourteenth Amendment and § 2 of the Fifteenth Amendment and made political policy decisions about the proper fora for enforcing the preclearance provisions.²⁰ Federal courts are bound to respect this legislative choice and to enforce it both in letter and in spirit. Local district courts still have important roles to play enforcing other provisions of the Voting Rights Act, particularly § 2, where private litigants bear the burden of convincing local judges, conducting "intensely local appraisals," that existing practices impair blacks' access to the political process. *Thornburg v Gingles*, 478 US 30 (1986). But Congress has placed a clear responsibility on covered jurisdictions that seek to *change* existing practices that may affect the voting rights of black citizens; they must bear

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changed budget-setting priorities "from a system of designating funds on a district-by-district need basis to one of designating funds on a county-wide need basis without regard to district lines," JS A-7. Each of these is a determination which is left by § 5 to the District of Columbia court or the Attorney General.

¹⁹ *McCain v. Lybrand*, 465 U.S. at 245.

²⁰ *South Carolina v Katzenbach*, 383 US 301 (1966); *Georgia v United States*, 411 US 526 (1973); *City of Rome v United States*, 446 US 156 (1980).

the burdens of proof, time, and inertia in a national forum before implementing these changes. *McCain v Lybrand*, 465 US 236, 243 (1984), citing *South Carolina v Katzenbach*, 383 US 301, 328 (1966). The danger of the decisions below and other § 5 decisions like them from local district courts²¹ is that the carefully crafted and demanding preclearance enforcement scheme designed by Congress will be seriously, perhaps fatally, side-tracked. If so, black citizens in covered jurisdictions will lose what arguably has been the most powerful and effective mechanism for safeguarding the right to vote ever enacted.

C. The local district court improperly considered the substantive issues relating to the voting law changes in the instant appeals.

The district court in the instant case, referring to this Court's opinion in *McCain v Lybrand*, 465 US 236, 250 n.17 (1985), quickly acknowledged that, as " 'reallocation[s] of authority' among government officials or bodies," the Russell County and Etowah County changes at issue here "may constitute changes affecting voting under section 5." JS A-10 (emphasis added). This conclusion by itself was enough to trigger § 5, and the local district court should have proceeded no further. Every change affecting voting is required by statute to receive preclearance, even one that seems innocent of discriminatory purpose or effect. Only the D.C. District Court and the Attorney

²¹ See, e.g., *Connor v Finch*, 431 US 407 (1977), listing the 14-year history of the recalcitrance of a Mississippi three-judge district court.

General are empowered to declare the change free of discrimination. Congress established the procedure requiring the Attorney General to object within sixty days of submission to serve as "a speedy alternative method of compliance" that would not "unduly delay implementation of nondiscriminatory legislation. . . ." *McCain v Lybrand*, 465 US at 246, quoting *Morris v Gressette*, 432 US 491, 503 (1977).

Put differently, the threshold question of coverage was fully resolved once the district court below found that the changes at issue had "the *nature* of the changes in election practices . . . which required preclearance. . . ." *McCain*, 465 US at 250 n.17 (emphasis added). By extending its inquiry into the factual circumstances of these particular changes in quest of "the potential for discrimination," the court below necessarily entered the realm of "substantive consideration" about the existence of a violation reserved for the D.C. fora (as the district court actually admitted when it launched its search for the proper "benchmark for comparison," JS A-9). Some reallocations of governmental authority may have no conceivable adverse impact on minority voting rights or may be so attenuated in their impact on voting rights that, notwithstanding the fact they affect the powers of elected representatives, they undoubtedly do not violate § 5. But that is not for the local district court to say.

There is no escaping the conclusion that the district court in this case went far beyond the question of § 5 coverage, that is, whether each challenged change was a "standard, practice, or procedure with respect to voting," 42 USC § 1973c. Rather, the court impermissibly determined, on the facts of these cases, that violations of law

were unlikely. Nothing makes this clearer than the majority opinion's disclaimers of having prejudged plaintiffs' § 2 claims against the very same voting practices that remain for the single-judge court. The majority said it had not reached the issues of whether the unit system "has in fact been administered with the purpose or effect of racial discrimination," JS A-18 n.17, or "whether black voters are denied equal voting rights under the governmental regimes currently prevailing in Russell or Etowah Counties." JS A-21-22 n.20. It claimed only to have decided "whether the disputed *changes* in this case have any potential impact on voting sufficient to raise them to the level of 'changes affecting voting.'" *Id.* Since, as the district court correctly held in this case, appellants are not foreclosed from showing at a full trial on their § 2 claims, that the changes in Russell and Etowah Counties have resulted in a dilution of their voting strength, then as a matter of logic the district court erred in finding that there was no potential for discrimination.

This is not a situation where black citizens can hope to use a § 2 action effectively to override the Attorney General's decision to grant § 5 preclearance to a challenged voting change.²² Instead, a federal court has held that, regardless of what evidence is later adduced, the change could not *possibly* cause discrimination. Moreover, in § 5 proceedings, a change should be denied preclearance if racial discrimination inheres in the practice

²² Cases in which private citizens won § 2 cases after the Attorney General had interposed no § 5 objection include *Major v Treen*, 574 FSupp 325 (ED Lou 1983), and *Thornburg v Gingles*, 478 US 30 (1986).

itself, regardless of whether the change has aggravated the discriminatory impact.²³

1. The district court's consideration of the merits of the Russell County changes

The district court plunged into the forbidden consideration of substantive violations when it assessed the 1979 Russell County change, not to determine whether it affected voting, but to decide whether or not there had been a "*change* in the potential for discrimination against minority voters." JS A-16 (emphasis in original). Without the aid of a plenary evidentiary hearing, the court made a factual determination that black voters lost no significant influence over road and bridge operations when management was transferred from the commissioner residing in their district to an engineer appointed by the commission majority. JS A-16-17.

Once it crossed into violation-assessment territory, the district court majority then refused to apply the substantive standards announced by the Attorney General. Without a word of explanation, the court completely ignored the rule of "substantive consideration" it had

²³ 28 CFR § 51.55(b)(2) (1987): "In those instances in which the Attorney General concludes that, as proposed, the submitted change is free of discriminatory purpose and retrogressive effect, but also concludes that a bar to implementation of the change is necessary to prevent a clear violation of amended section 2, the Attorney General shall withhold section 5 pre-clearance." This was adopted after Congress endorsed a similar standard. S. Rep. No. 417, 97th Cong., 2d Sess. 12 n. 31 (1982).

recognized earlier in its opinion, that the challenged change must be compared with the precleared practices in effect at the time of submission, not those in effect at the time of enactment. JS A-9-10. The potential for discrimination against black Russell County voters if road and bridge authority was shifted from a single-member district commissioner to the county engineer "is too obvious to require discussion." JS A-16. But the court found irrelevant a court-ordered single-member district election system that had been precleared in 1985, because it was not used in 1979 when the unit system change was made.

By ruling that the 1979 unit system change was beyond the scope of § 5, the district court relieved the Russell County government of its statutory burden of demonstrating that it had neither the purpose nor the effect of diluting black electoral strength – and foreclosed the opportunity for black citizens to convince the Attorney General or the District Court for the District of Columbia that it did have such purpose or effect. The decision thus pretermits consideration of possible factual circumstances like the following:

(1) Even though all the road commissioners had been elected in countywide voting, the district residency requirement by custom and practice made them particularly responsive to the voters in their residency districts, and as a practical matter black voters, most of whom reside in one district, lost political influence over road and bridge operations when authority was shifted to the county engineer.

(2) The county commissioners and local legislators anticipated in 1979 the coming court-ordered change to single-member districts that would allow black voters to elect one or more representatives of their choice. As of 1979 the Fifth Circuit recently had affirmed the district court judgment striking down at-large elections in Mobile,²⁴ and district courts had ordered single-member districts in several Alabama jurisdictions, including the State legislature.²⁵ The District Court found in *Dillard*, 640 FSupp at 1356-57 – a case in which Etowah County Commission was a defendant – that the Alabama legislature was well aware of the potential electoral strength of blacks and had enacted laws on a variety of occasions so that blacks would not have electoral influence even if they obtained full and free access to the ballot. The transfer to the county engineer of authority over road and bridge operations was intended to head off the possibility that a black commissioner would have run these operations in his or her own district – which would have been

²⁴ *Bolden v City of Mobile*, 571 F2d 238 (5th Cir 1978), aff'g 423 FSupp 384 (SD Ala 1976), rev 446 US 55 (1980), vac and rem 626 F2d 1324 (5th Cir 1980), after remand by US Supreme Court, 542 FSupp 1050 (SD Ala 1982); *Brown v Moore*, 428 FSupp 1123 (SD Ala 1976), vac. & rem. sub nom. *Williams v Brown*, 446 US 236 (1980), after remand by US Supreme Court, 542 FSupp 1078 (SD Ala 1982), aff'd 706 F2d 1103 (11th Cir 1983), aff'd mem. sub nom. *Board of School Comm'rs v Brown*, 464 US 1005 (1983).

²⁵ *Corder v Kirksey*, 585 F2d 708 (5th Cir 1978); *Robinson v Pottinger*, 512 F2d 775 (5th Cir 1975); *Hendrix v McKinney*, 460 FSupp 626 (MD Ala 1978); *Sims v Amos*, 340 FSupp 691 (MD Ala 1972), 365 FSupp 215 (1973) (3-judge court); *Broadhead v Ezell*, 348 FSupp 1244 (SD Ala 1972).

the case after the *Dillard* decree became effective in 1985. In this event, the county would have adopted the 1979 change to a county "unit system" for an unlawfully discriminatory purpose.

2. The district court's consideration of the merits of the Etowah County changes

Similarly, the district court's absolution of the 1987 Common Fund Resolution rammed through by the four holdover commissioners in Etowah County, over the vigorous objections of the new single-member district commissioners, foreclosed plenary consideration of the following evidentiary scenarios:

(1) Even if, in theory, the power of a single commissioner to control road and bridge spending within his district seems "minor and inconsequential" in comparison to the total commission's power to allocate funds among the districts, in fact and in practice it was a critical component of the four holdovers' road and bridge monopoly, which the district court found to have a "blatant and obvious" potential for discrimination, JS A-20.

(2) Like the Russell County situation, Etowah County's white commission majority adopted the common fund resolution for the racially discriminatory purpose of preventing the representative of black voters from controlling even a part of the road and bridge budget.

The Etowah Common Fund Resolution is different from the "benchmark" to which any new enactment must

be compared.²⁶ In this case, the benchmark would be the *Dillard* decree, under which the commissioners elected from Districts 5 and 6 "shall have all the rights, privileges, duties and immunities of the other commissioners, who have heretofore been elected at large, until their successors take office." At the time the *Dillard* decree became effective, commissioners had the power to make resource-allocation decisions for their districts. The 1987 resolutions, together and separately, deprive the commissioner elected by blacks of that power.

The district court in this case strayed over the line into the territory reserved for the D.C. District Court and the Attorney General by deciding, with regard to Etowah County, that "the reallocation of authority embodied in the common fund resolution was, in practical terms, insignificant. . . ." The district court did not hold that the Common Fund Resolution lacked the "potential for discrimination," but that it was insignificant. This Court has dealt in the past with election changes that might strike some as "insignificant" – the transfer of a polling place, *Perkins*, changes in personnel regulations, *Dougherty*, the extension of city limits to include uninhabited territory, *City of Pleasant Grove v United States*, 479 US 462 (1987) – but this Court has held firm to the standard first expressed in *Allen* that even "minor" changes affecting elections and voting must be precleared.

²⁶ 28 CFR § 51.54(b). See also, supplemental information to § 5 regulations, 52 Fed Reg 486, 487 (6 Jan. 1987), citing *Beer v United States*, 425 US 130, 140-42 (1976); *City of Lockhart v United States*, 460 US 125, 131-36 (1983).

- D. The district court should have accorded deference to the decision of the Attorney General that the changes in this case must be submitted under § 5.**

A decision of a local district court to deny an injunction under § 5 is a *de facto* preclearance of the election law change. Since the Attorney General has the primary enforcement responsibility under § 5, his decisions about the coverage of the Act ought to be given great deference. In *United States v Sheffield Board of Comm'rs*, 435 US 110 (1978), this Court held it should accord deference to the Attorney General's interpretation of the Act's coverage, especially considering the extensive role played by the Attorney General in drafting the statute and explaining its operation to Congress. In *NAACP v Hampton County Election Commission*, 470 US 166, 179 (1985), the Court based its decision in part on the Attorney General's prior determinations that § 5 covered changes in election dates. In *Dougherty County Board of Education v White*, 439 US 32, 39 (1978), the Court specifically cited the Attorney General's request that a personnel rule be submitted under § 5 as an "interpretation . . . entitled to particular deference." In *Perkins v Matthews*, 400 US 379, 390-94 (1971), the Court decided that "location of polling places and municipal boundary changes come within § 5" after citing prior decisions of the Attorney General to the same effect and noting that the Court pays great deference to the decisions of the Attorney General in the interpretation of the Act.

The balance of equities is clear. On the one hand, if the local district court enjoins a change that ought not be considered by the Attorney General, the State or locality

has been denied the right to enforce its new law or practice for only 60 days. If the Attorney General determines that preclearance is not required, he can notify the jurisdiction immediately. On the other hand, the decision below in this case sends the message that some election law changes are *de minimis*. If jurisdictions decide that they, rather than the Attorney General, will choose which election-related changes should be submitted, the minority citizens of the jurisdiction may be denied the rights guaranteed by § 5. The Court discussed the Attorney General's lack of resources to discover all changes that *should be* submitted in *McCain v Lybrand*, 465 US 236, 248-49 (1984). Section 5 can only work if States and localities submit election-law changes. "In the legislative history of the Act, § 5 has been deemed to be a 'vital element' of the Act to ensure that 'new subterfuges will be promptly discovered and enjoined.' But Congress recognized that it was only as vital as state compliance allowed it to be." *McCain*, 465 US at 248 (citation omitted).

II. The district court improperly departed from this Court's prior decisions requiring a State to preclear a transfer of responsibilities from elected to appointed officials or changes in powers of officials.

The protection given appellants under the Voting Rights Act extends beyond simply requiring the use of single-member districts in electing the Etowah and Russell County Commissions. The right to vote includes "all action necessary to make a vote effective." *Allen*, 393 US at 565-66 (1969), *citing* § 14 of the Voting Rights Act,

42 USC § 1973l(c)(1), and *Reynolds v Sims*, 377 US 533, 555 (1964). "The right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot." *Allen*, 393 US at 569.

A. This Court has held that the reallocation of power from one public official to another must be submitted for preclearance under § 5.

One of the three cases decided with *Allen* was *Bunton v Patterson*, in which the plaintiffs alleged that the State of Mississippi had violated § 5 of the Voting Rights Act by not seeking preclearance of a law requiring eleven counties to appoint, instead of elect, the county superintendent of education. *Allen*, 393 US at 550-551. This Court agreed and held, "an important county officer in certain counties was made appointive instead of elective. The power of a citizen's vote is affected by this amendment; after the change, he is prohibited from electing an officer formerly subject to the approval of the voters." *Allen*, 393 US at 569-570.

If the State of Alabama had changed the office of Russell County commissioner from elective to appointive, it would have had to obtain preclearance. Similarly, the State must obtain preclearance if it shifts powers to an appointive officer while continuing to elect the officer from whom the powers were taken – that is, when it use indirect means to accomplish the goal of removing voter control over the official exercising significant powers. In the present case, the voters continue to elect county commissioners, but the most significant power formerly held by those commissioners has been shifted to the county

engineer, over whom the voters have no direct control. The net result of the Russell County change is the same as in *Bunton* – less power for the voters over their local affairs.

In *McCain v Lybrand*, 465 US 236 (1984), this Court considered whether a change in county government from two appointed and one elected member to three elected members had to be submitted under § 5 and held,

While this matter may be more fully explored in future proceedings after remand, several changes [covered by § 5] are suggested: . . . the basic reallocation of authority from the state legislative delegation to the Council, [and] the shift from two appointed Board positions to at-large election of their Council counterparts. . . .

McCain, 465 US at 250 n.17. Surely, if a change from appointment to election must be precleared, a transfer of power from an elected to an appointed official must similarly be submitted for preclearance.

B. District courts hearing similar matters have likewise held that changes in the allocation of governmental powers require preclearance.

In *Horry County v United States*, 449 FSupp 990 (D DC 1978) (3-judge court), the court held a South Carolina statute was a change in electoral practices requiring preclearance because it provided for the election of public officials who formerly were appointed by the Governor.

An alternate reason for subjecting the new method of selecting the Horry County governing body to Section 5 preclearance is that the change involved reallocates governmental

powers among elected officials voted upon by different constituencies. Such changes necessarily affect the voting rights of the citizens of Horry County, and must be subjected to Section 5 requirements. Cf. *Perkins v Matthews*, [400 US 379 (1971)]; *Allen v State Board of Elections*, *supra*.

449 FSupp at 995. See also, *County Council of Sumter County v United States*, 555 FSupp 694 (D DC 1983) (3-judge court) (preclearance required of a law that eliminated the legal power of the governor and general assembly over local affairs and vested it exclusively in a county council elected at large by county voters).

Addressing a change resembling that effected by Act 79-652, the *Horry County* court also held that the statute required preclearance because it changed the duties of the chairman of the county council. *Horry County*, 449 FSupp at 995. The chairman previously had authority to direct the construction and repair of all roads and bridges in the county and supervise the employees engaged in such work, subject to the approval of a majority of the Board. The new statute assigned the chairman no powers or authority different from those of the other council members. *Horry County*, 449 FSupp at 993-94. The new statute also gave the county council additional taxing, legislative and administrative duties which were not provided under the previous statute. *Horry County* at 994.

The duties of the chairman of the former Horry County Board of Commissioners and those of the chairman of the Horry County Council under Act R546 are sufficiently different that in this respect also Act R546 constitutes a change in electoral practices requiring pre-clearance under Section 5 of the Voting Rights Act -

unlike the two at large council seats in *Beer v United States*, . . . 425 US [130] at 139 [(1976)], which underwent no change at all.

Horry County, 449 FSupp at 995-96.

In *Hardy v Wallace*, 603 FSupp 174, 178-79 (ND Ala 1985) (3-judge court), the court held that the State of Alabama must preclear a statute which changed the appointive power over a local racing commission from the local legislative delegation to the governor. Writing for the court, the late Judge Robert S. Vance noted that "the most relevant attribute of the challenged act is its effect on the power of the voters rather than any aspect of the electoral process." *Hardy*, 603 FSupp at 178. Similarly, the power of the voters in black-majority districts to choose a commissioner who will follow their wishes and have the power to do so is a relevant attribute of the prior situations in Etowah County and Russell County.

III. The district court decision regarding Russell County conflicts with decisions of this Court and the regulations of the Department of Justice regarding the proper "benchmark" for comparison of an unprecleared change in election-related law.

The argument in this section addresses an issue the district court should not have reached, namely, the likelihood the challenged Russell County change might violate the substantive prohibitions of Section 5. Thus, it is not in a posture for consideration by this Court. It is briefed here strictly in the alternative event that this Court nonetheless decides to consider the question.

The district court recognized the appropriate statutory test when it stated:

[I]n assessing the discriminatory or retrogressive effect of a change, the proper benchmark for comparison is the regime 'in effect at the time of the submission,' taking into account duly precleared changes which have occurred subsequent to the original statutory benchmark date.

...

We therefore measure the purported changes in this case against the benchmark of the 1964 regime as modified by any intervening duly precleared changes.

JS A-14-15. But it nonetheless ignored this test in analyzing the change in Russell County.

In *City of Rome v United States*, 446 US 156 (1980), this Court explained that when a change is not submitted until years after its enactment, the change is to be analyzed in light of the now-existing system rather than in light of the system existing at the time the unprecleared change was enacted. This Court held,

Because Rome's failure to preclear any of these annexations caused a delay in federal review and placed the annexations before the District Court as a group, the court was correct in concluding that the cumulative effect of the 13 annexations must be examined from the perspective of the most current available population data.

Rome, 446 US at 186. The district court in *Rome* had used the current perspective because § 5 "requires, in the future tense, that the plaintiff jurisdiction demonstrate that its voting changes 'will not' have a discriminatory effect," *City of Rome v United States*, 472 FSupp 221, 246 (D DC 1979) (3-judge court) (emphasis in original). The

Department of Justice regulations governing § 5 submissions have codified this standard. 28 CFR § 51.54(b) provides, in part, as follows:

(1) In determining whether a submitted change is retrogressive the Attorney General will normally compare the submitted change to the voting practice or procedure *in effect at the time of the submission*. If the existing practice or procedure was not in effect on the jurisdiction's applicable date for coverage . . . and is not otherwise legally enforceable under Section 5, it cannot serve as a benchmark, and . . . the comparison shall be with the last legally enforceable practice or procedure used by the jurisdiction.

(2) The Attorney General will make the comparison based on the *conditions existing at the time of the submission*. [Emphasis supplied.]

Despite its citation of the correct standard, the district court failed to follow the standard.

In 1964 the Russell County Commission had three members elected at large from residency districts; within each residency district the commissioner controlled road work, JS A-2. In 1985 the commission was enlarged to seven members, elected from single-member districts; this change was precleared, JS A-4. Thus, today "the 1964 regime as modified by any intervening duly precleared changes," JS A-15, is seven single-member districts with each commissioner having control over road construction and maintenance in his or her district.

Rather than judging whether the change to a county unit system affects voting in the context of the 1985 precleared change to single-member districts, the district court incorrectly judged the county unit system as if it

affected only an at-large system. The district court was deciding whether it would have required the county unit system to be submitted for preclearance in 1979 without regard for the events that have occurred since then. The district court committed clear error by centering its attention only on the conditions immediately "before and after the 1979 change," JS A-21, when the county commission was still elected at large.²⁷

Since "the question [in a § 5 injunction action] is not whether the provision is in fact innocuous and likely to be approved, but whether it has a *potential* for discrimination," *Dougherty County Board of Education v White*, 439 US 32, 42 (1978) (emphasis in original), the court must look at all evidence that might demonstrate a potential for discrimination. The law is "a ass and a idiot"²⁸ if the court must blind itself to *actual* discrimination by pretending that it would not have seen the *potential* for that discrimination several years earlier.

CONCLUSION

For the reasons stated in this brief, the appellants pray that the Court will reverse the decision of the United States District Court for the Middle District of Alabama and remand this action with instructions to issue the

²⁷ Under the principles discussed in Section I and II of this brief, even in 1979 the Russell County changes should have been submitted for preclearance.

²⁸ Charles Dickens, *Oliver Twist*, Chap. 51 (1837-38).

injunctions prayed by the appellants against the enforcement of the Etowah County Common Fund Resolution and Alabama Act 79-652.

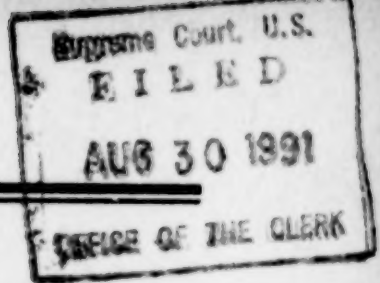
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Nos. 90-711 and 90-712



IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

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on behalf of others similarly situated,
v. *Appellant,*

ETOWAH COUNTY COMMISSION,
Appellee.

ED PETER MACK, and NATHANIEL GOSHA, III, individually
and on behalf of others similarly situated,
v. *Appellants,*

RUSSELL COUNTY COMMISSION,
Appellee.

On Appeal from the United States District Court
for the Middle District of Alabama

**BRIEF OF APPELLEE
ETOWAH COUNTY COMMISSION**

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ETOWAH COUNTY COMMISSION**

STATEMENT

For a number of years prior to 1986, Etowah County was governed by a five-person County Commission. During this time period, there were four commissioners, who were elected at large but resided in each of four districts, and a chairman, who was also elected at large. In addition to voting on matters within the Commission's general jurisdiction, the primary responsibility of each indi-

vidual commissioner was supervising maintenance of roads and bridges within his district through a separate district "road shop." The chairman was primarily responsible for other functions, including preparation of the county budget and management of the county courthouse building and grounds.

In 1986, the County signed a consent decree in *Dillard v. Crenshaw County*, No. 85-T-1332-N (M.D. Ala. Nov. 12, 1986), in which it agreed to phase in a single-member-district structure. The decree, which was duly precleared by the Attorney General under section 5 of the Voting Rights Act in October 1986, called for creation of six commissioner districts and eventual elimination of the separate office of chairman. Pursuant to the decree, two new commissioners, including appellant Presley, were elected by the residents of new districts 5 and 6 in December 1986. They joined the four incumbent commissioners in January 1987. At the same time, the incumbent chairman relinquished his vote but was authorized to remain in office until 1993¹

These changes required the Commission to address the issue of how the duties of commissioners should henceforth be assigned. In so doing, it faced two realities. First, Commissioner Presley's new district contained only 2.6 miles of county road, constituting only .3% of the total county road mileage.² This disparity was a direct result of the effort to create a black-majority district in a county where most blacks lived within city limits.³ Second, there were still only four "road shops" and it

¹ Two more single-member-district seats—those in districts 2 and 3—were filled by two incumbent commissioners in elections held in 1988. The final two new seats were to be filled in 1990.

² J.A. 72. The other new commissioner's district contained 35.22 miles of county road, constituting four percent of the total. *Id.*

³ Roads within incorporated municipalities are separately maintained and funded by the municipalities themselves.

would have been costly and inefficient to create six shops corresponding to the six new districts. J.A. 64-65.

The County Commission, in August 1987, responded to these realities by enacting two resolutions. One, the "road supervision resolution," provided that the four holdover commissioners would continue to oversee their four road shops and would "jointly oversee, with input and advice of the County Engineer, the repair, maintenance and improvement of streets, roads and public ways of all of Etowah County." J.S. App. A-48. The two new commissioners were simultaneously given duties that had previously belonged to the chairman. Commissioner Presley became supervisor of the courthouse complex, Commissioner Williams was responsible for the engineering department, and the two of them were jointly responsible for the county farmers' market. *Id.*⁴

The second resolution—the "common fund resolution" here at issue—altered the system for allocating funds to road maintenance. Under the former system, the County Commission would annually allocate a sum of money for road maintenance to each of the four old road districts and the commissioner for each district retained control over the spending of that money in his district during the year. The money at issue came from state taxes earmarked specifically for road repairs. In practice, these allocations typically reflected the miles of county road in each district.⁵

⁴ The number of county employees under Mr. Presley's supervision at the courthouse, and the budget he administered, approximately equaled the number of employees and expenditures at each of the road shops. J.A. 62-63, 72, 75.

⁵ See Hitt Depos. at 21 (noting that district allocations were "more or less" equal but varied based on the road mileage in each). Appellants suggest that funds were simply divided equally among the four districts, Br. at 5, citing only to the Hitt deposition, which, as just noted, indicates otherwise. See also J.S. App. A-19 ("We find as a matter of fact . . . that the individual commissioners were

Under the common fund resolution, the practice of making general allocations of funds to separate districts was abolished. Under the new system, "all monies earmarked and budgeted for repair, maintenance and improvement of the streets, roads and public ways of Etowah County" were "placed and maintained in common accounts" to be "used county-wide in accordance with need." J.S. App. A-49. Thus, the Commission as a whole undertook to make decisions about the expenditure of road maintenance funds on projects throughout the County.

This case was filed on May 5, 1989. The original complaint charged that Etowah County and Russell County had engaged in racial discrimination in the governance of road maintenance operations in violation of the Fourteenth and Fifteenth Amendments, Title VI of the Civil Rights Act of 1964, and section 2 of the Voting Rights Act, 42 U.S.C. § 1973.⁶ Claims under section 5 of the Voting Rights Act were then added and a three-judge district court was convened to consider those new claims first. *See* 42 U.S.C. § 1973c. The district court resolved the section 5 issues based on a factual record submitted in the form of depositions, affidavits, and exhibits.

On August 1, 1990, the three-judge court ruled unanimously that the "road supervision resolution" should have been precleared under section 5. It reasoned that, prior to 1987, all voters in Etowah County "participated in

never, prior to the common fund resolution, given equal prorated shares of the budget over which they could exercise exclusive individual control, such that subsequent shifts in budget allocation among the districts proceeded on some kind of 'horse-trading' basis.")

Some major road projects, such as paving unpaved roads, were handled through contracts with private firms, which, after a bidding process, were individually approved by the Commission as a whole. J.A. 53-54, 65-66.

⁶ All claims against a third defendant, Escambia County, were later voluntarily dismissed.

choosing the commissioners responsible for road management" (i.e., the four commissioners elected at large), whereas "the 1987 resolution stripped the voters in districts 5 and 6 of any electoral influence over such commissioners." J.S. App. A-20. The court did not determine whether the resolution "had an actual discriminatory purpose or effect," *id.* at A-21, but concluded that the "change had such a *potential*," *id.* (emphasis in original), and thus should have been precleared.

By contrast, the district court also ruled that the common fund resolution did not require preclearance. The majority opinion, authored by Circuit Judge Frank Johnson, held that "the reallocation of authority embodied in the common fund resolution was, in practical terms, insignificant" since the entire Commission, "both before and after the disputed change," had the authority to "allocate funds among the various districts, and thus to effectively authorize or refuse to authorize major road projects on the basis of a county-wide assessment of need." J.S. App. A-19.⁷ The court acknowledged that, prior to the resolution, "the individual commissioners may have been able to set priorities regarding the expenditure of whatever portions of the road budget the entire Commission saw fit to allocate to their respective districts." *Id.* It reasoned, however, that this power "pales dramatically" in comparison to the power, always held by the entire Commission, to determine the amount of money to be spent in each district. *Id.* Thus, the "common fund resolution effected no shift in authority between officials with different constituencies as to the overwhelmingly decisive and controlling budgetary powers exercised by the Etowah

⁷ The court also held that section 5 generally is not triggered where powers shift among officials with the same constituency. J.S. App. A-10 to A-14. This principle formed the basis of the majority's companion holding that section 5 was not triggered by Russell County's shift of road-maintenance authority from its County Commission to an appointed official answerable to that Commission. *See id.* at A-16 to A-18.

County Commissioners, because such ultimate budgetary powers have always been exercised by the entire Commission." *Id.*

The court went on to reject the suggestion that it had intruded improperly into assessing the merits of the section 5 claims in this case. Noting "that reallocations of authority *as such* do not, without more, have any obvious relation to voting rights," *id.* at A-22 n.21 (emphasis in original), it stated that in assessing the preclearance issue in this case it was "tread[ing] a path at the far edges of the domain of section 5 law," *id.* The preclearance issue presented here, in the court's view, required it to "reach and decide the inherently factual threshold issue of whether the disputed reallocations of authority had any significant potential impact on voting rights." *Id.* Judge Thompson, in dissent, argued that the common fund resolution should have been precleared. He contended that the resolution cannot be considered separately from the road supervision resolution and that the two resolutions together can be viewed as part of a scheme to deprive the two newly elected commissioners of any role in road maintenance operations. *Id.* at A-28 to A-33.

Appellant Presley appealed to this Court from the district court's holding that preclearance of the common fund resolution was not required.⁸ Appellee Etowah County Commission did not cross-appeal from the ruling with respect to the road supervision resolution.⁹ This Court noted probable jurisdiction on May 13, 1991.

⁸ The plaintiffs challenging the actions of Russell County brought a parallel appeal from the district court's ruling that Russell County's shift of control over road operations from its commission to an appointed official also did not require preclearance.

⁹ This decision was based on the fact that the road supervision resolution was effectively superseded by a subsequent 1990 resolution. J.A. 50-52. That resolution provided that significant road projects would continue to be funded by the Commission as a whole, based on the recommendations of the County Engineer, while com-

SUMMARY OF ARGUMENT

1. Section 5 of the Voting Rights Act requires preclearance of all new standards, practices, or procedures “with respect to voting.” 42 U.S.C. § 1973c. On its face, this statute cannot fairly be read to apply to enactments that, without altering the *electoral* process in any way, reallocate power or authority among incumbent officials. Nor is there any support for such a strained interpretation in the legislative history.

The Court’s decisions applying section 5 have been consistent with the statutory language, drawing a line between changes that directly affect elections and other changes in governmental policies or practices. Thus, while the Court has interpreted the statute to cover many different types of changes affecting the electoral process, *see, e.g., NAACP v. Hampton County Election Comm’n*, 470 U.S. 166 (1985) (change in scheduling of election); *Dougherty County, Georgia, Bd. of Educ. v. White*, 439 U.S. 32 (1978) (requirement that public employees take unpaid leave when running for office); *City of Richmond v. United States*, 422 U.S. 358 (1975) (annexation), it has not required preclearance of other legislative policy judgments, *see Lucas v. Townsend*, 110 S. Ct. 858 (1990) (school board decision to combine three capital projects in a single bond referendum). Moreover, the Court has never held that a reallocation of official authority, without more, constitutes a change affecting “voting.” Nor has

missioners in all six districts would have individual control over minor matters such as filling potholes and grass cutting. *Id.* It continued to assign routine supervision of the four road shops to the four commissioners previously handling this task, but did not contain language comparable to paragraph 7 of the road supervision resolution, J.S. App. A-48, which had authorized these four commissioners to “jointly oversee” road operations in the County.

The district court ruled that the 1990 resolution did not moot the preclearance issue with respect to the road supervision resolution because it did not “entirely undo the changes wrought by the 1987 resolution.” J.S. App. A-21 n.20.

the Department of Justice adopted such a view in a consistent or well-considered way.

2. It defies common sense to argue that Congress intended to require preclearance of all laws that, like the Etowah County common fund resolution, can be viewed as shifting power among elected officials. To begin with, such a rule would enlarge the scope of this unique procedure to almost unimaginable proportions. A vast number of enactments each year alter in some way the allocation of authority between the legislative and executive branches in covered jurisdictions, or move power between the state level and the local level. As a result, appellants' proposed rule would greatly heighten the federalism concerns that are inherent in a procedure requiring advance federal approval of new state or local laws and practices.

The rule would also create enormous line-drawing problems. Having abandoned the current line—between changes that directly affect elections and those that do not—the Court would face the insuperable task of devising standards for determining which new laws create a net change in the authority of elected officials.

Finally, the “effects” test incorporated by Congress into section 5 would not work in an intelligible way outside the electoral context. Surely Congress could not have intended the Justice Department to make subjective determinations about which reallocations of authority have the effect of shifting power from officials who are appropriately “responsive” to minority concerns to others who are not. Nor would a more objective approach—~~the~~ using on the proportion of minorities in each official's constituency—be workable. That approach would prevent covered jurisdictions from transferring authority, for *any* reason, from an official or body with a larger minority constituency to an official or body with a smaller one.

It would make far more sense to conclude that Congress intended cases like this one to be litigated in conventional

lawsuits under the Fourteenth Amendment or some other applicable provision. Such an alternative remedy avoids all of the practical problems just outlined, and likely would be much more effective than asking the Justice Department to uncover a handful of racially motivated subterfuges in a mountain of new requests for preclearance of routine state and local enactments.

3. For several reasons, it would be particularly inappropriate to treat the common fund resolution as a threat to "voting rights" that requires preclearance. First, at most, it was a revocation of a previous discretionary delegation of authority by a legislative body. The withdrawal of such a delegation does in one sense affect the authority of the delegee, but it does not change the balance of *power* between the legislative body and that executive official. Thus, both before and after the withdrawal, voters retain the same right to vote for the body with the final authority and control—the legislature.

It would also be pointless to require preclearance of express revocations of delegated authority. Legislatures could achieve the same result by cutting, or threatening to cut, the budget of the official involved. But, under any theory, a decision about *budgetary* priorities cannot fall within the scope of section 5.

Finally, contrary to the assumption of the district court, this was a case where authority was always in the hands of officials or bodies with the same constituency. In such a case as well, it makes no sense to suggest that a reallocation of authority among officials poses a threat to voting rights. The voters retain exactly the same level of influence both before and after the change.

ARGUMENT

Under section 5 of the Voting Rights Act, a covered jurisdiction must preclear every change in its laws or practices relating to "voting." The Court is now being asked to extend this rule to every change in the "authority" possessed by any elected official. This proposal, however, requires both a strained reading of the statute and a major departure from this Court's existing precedents. It further requires the insupportable assumption that Congress intended the Voting Rights Act to be an instrument for federal review of a vast range of state and local policy decisions outside the electoral context, utilizing standards that make no sense outside that context. For these reasons, the Court should reject appellants' unnatural reading of the statute, and continue its current practice of requiring preclearance only when a jurisdiction makes a change directly affecting the *electoral* process.

I. PRECLEARANCE OF CHANGES IN THE AUTHORITY OF INDIVIDUAL ELECTED OFFICIALS IS REQUIRED NEITHER BY THE STATUTORY LANGUAGE NOR BY THIS COURT'S PRECEDENTS.

This case calls on the Court, for the first time, to apply section 5 of the Voting Rights Act to legislation that did not affect the conduct of elections in any way but simply altered the independent authority of particular elected officials. Appellants argue that the common fund resolution transferred the power to control expenditure of road funds from individual commissioners to the County Commission, and further contend that every such "reallocation of authority" poses a threat to voting rights and must be precleared. Such a rule, however, is justified neither by the statutory language nor by the governing case law.

Section 5 prohibits covered jurisdictions from imposing any new "voting qualification or prerequisite to vot-

ing, or standard, practice, or procedure with respect to voting” until a court or the Attorney General determines that the change has neither a purpose nor an effect of “denying or abridging the right to vote on account of race or color.” 42 U.S.C. § 1973c. This language, on its face, renders appellants’ position highly problematic. It is hardly a natural reading of the statute to treat a change in the power of an incumbent official as a “standard, practice, or procedure with respect to voting” that should be reviewed to determine whether it abridges the “right to vote.” To the contrary, as this Court has noted, “[t]he language of § 5 clearly provides that it applies only to proposed changes in *voting* procedures.” *City of Lockhart v. United States*, 460 U.S. 125, 134 (1983) (emphasis supplied) (quoting *Beer v. United States*, 425 U.S. 130, 138 (1976)).

Not surprisingly, neither appellants nor the United States offer a shred of legislative history indicating that Congress ever intended section 5 to cover transfers of authority among officials. The reason, of course, is that Congress never thought it was regulating anything other than the electoral process. See *Allen v. State Bd. of Elections*, 393 U.S. 544, 566 (1969) (“The legislative history on the whole supports the view that Congress intended to reach any state enactment which altered the *election law* of a covered State in even a minor way.”) (emphasis supplied).¹⁰ In passing a law expressly aimed at the protection of “voting rights,” it saw a clear distinction between this discrete problem and all other aspects of governmental operations that might be perceived as discriminatory.

¹⁰ See also H.R. Rep. No. 439, 89th Cong., 1st Sess. 26 (1965) (section 5 “deals with attempts by a State or political subdivision . . . to alter . . . *voting qualifications and procedures*”) (emphasis added); S. Rep. No. 417, 97th Cong., 2d Sess. 5-6 (1982) (accompanying extension of statute) (“The Act also required covered jurisdictions to preclear any changes in *voting or elections laws*”) (emphasis added).

In this Court's own decisions interpreting section 5, it has drawn the same line—authorizing coverage of all matters relating to elections but not of other types of changes in governmental policies or practices. The Court began its examination of the scope of the statute in *Allen v. State Bd. of Elections*, *supra*. The main issue there was whether the statute applies to all aspects of the electoral process or, as Justice Harlan argued in dissent, *id.* at 582-93, applies only to restrictions on the ability of citizens to register to vote.¹¹ The Court opted for the more expansive approach, concluding that section 5 “was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race.” *Id.* at 565. But it never suggested that the statute might apply to a change that does not in some way affect elections.

Since *Allen*, the Court's decisions have been consistent in this regard. It has recognized that the “purpose of § 5 has always been to insure that no *voting-procedure* changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the *electoral franchise*.” *City of Lockhart v. United States*, 460 U.S. at 134 (emphasis supplied) (quoting *Beer v. United States*, 425 U.S. at 141). Thus, for example, section 5 has been applied not only to changes affecting voter eligibility but also to changes in electoral districts,¹² the racial composition of the elec-

¹¹ As an historical matter, Justice Harlan's interpretation may well have been closer to what Congress actually had in mind in 1965. See Report of the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, *reprinted in* S. Rep. No. 417, 97th Cong., 2d Sess. 118-23 (1982); Thernstrom, *The Odd Evolution of the Voting Rights Act*, 55 Pub. Interest 49, 52 (1979); Blumstein, *Defining and Proving Race Discrimination: Perspectives on the Purpose vs. Results Approach from the Voting Rights Act*, 69 Va. L. Rev. 633, 680-82 (1983).

¹² See *Georgia v. United States*, 411 U.S. 526 (1973).

torate,¹³ candidate eligibility requirements,¹⁴ the location of polling places,¹⁵ the timing of elections,¹⁶ or the number of offices available.¹⁷ In all these cases, there was a direct linkage between the change at issue and either (1) the pool of authorized voters, (2) the terms on which they could participate in the process, or (3) the candidates they could select from. See *Dougherty County, Georgia, Bd. of Educ. v. White*, 439 U.S. 32, 52-53 (1978) (Powell, J., dissenting) ("In *Allen*, as in each of the cases relied upon today, the Court was considering an enactment relating directly to the way in which elections are conducted . . .").¹⁸

More recently, the Court has drawn this line directly, by summarily affirming in *Lucas v. Townsend*, 110 S. Ct. 858 (1990). The court below in *Lucas* held that section 5 was inapplicable to a school board's decision to propose three capital projects as part of a single bond referendum rather than three separate ones. It reasoned

¹³ See *City of Richmond v. United States*, 422 U.S. 358 (1975).

¹⁴ See *Dougherty County, Georgia, Bd. of Educ. v. White*, 439 U.S. 32 (1978); *Allen v. State Bd. of Elections*, 393 U.S. at 570.

¹⁵ See *Perkins v. Matthews*, 400 U.S. 379, 387 (1971).

¹⁶ See *NAACP v. Hampton County Election Comm'n*, 470 U.S. 166 (1985).

¹⁷ See *City of Lockhart v. United States*, *supra*.

¹⁸ *Dougherty County*, involving a requirement that public employees take unpaid leaves when they run for elective office, probably is the decision reading section 5 most expansively—since the rule at issue was a personnel regulation rather than part of any election law. Even there, however, there was an explicit nexus between the rule and the electoral process, since the rule specifically affected the financial burdens associated with candidacy for public office. Moreover, in *Dougherty County*, four justices stated in dissent that it "tortures the language of the Act to conclude that this personnel regulation, having nothing to do with the conduct of elections as such, is state action 'with respect to voting.'" *Dougherty County, Georgia, Bd. of Educ. v. White*, 439 U.S. at 51 (Powell, J., dissenting).

that such a decision involved substantive governmental policy, not voting.¹⁹ The United States, in urging affirmance in *Lucas*, drew precisely the same distinction²⁰ and argued that the “decision to combine these projects [was] a policy decision . . . essentially no different from a legislative committee’s decision to include only a certain combination of projects in an appropriations bill, or not to include any of them.” Br. for the United States as *Amicus Curiae* at 11, *Lucas v. Townsend*, 110 S. Ct. 858 (1990) (No. 89-400). As such, “it was not a voting matter within the purview of Section 5.” *Id.*

Having recognized the distinction between electoral changes and other aspects of governmental policymaking, the Court has never indicated that reallocations of authority among officials fall into the former category. Appellants’ efforts to show otherwise are unavailing. They point to the Court’s expansive interpretation of section 5—“to reach any state enactment which altered the election law of a covered State in even a minor way,” *Allen v. State Bd. of Elections*, 393 U.S. at 566—but

¹⁹ See *Lucas v. Townsend*, 698 F. Supp. 909, 911 (M.D. Ga. 1988), *aff’d mem.*, 110 S. Ct. 858 (1990) (“‘the normal formulation of policy by elected representatives, e.g., setting employees’ salaries, hiring employees, adopting capital budgets, [does] not constitute [a change] affecting voting, even though [the decisions] result in the exercise of discretion and even though a referendum may be required for final decision’”) (quoting the Brief of the United States as *Amicus Curiae*) (brackets in original).

The district court also held that the board’s action was not a “change,” for purposes of section 5. *Id.* at 912. But the United States has recently argued persuasively that this alternative holding likely was not the basis of this Court’s summary affirmance. See Br. for the United States as *Amicus Curiae* at 13-15, *Board of Pub. Educ. & Orphanage for Bibb County v. Lucas*, 111 S. Ct. 2845 (1991) (No. 90-1167).

²⁰ See Br. for the United States as *Amicus Curiae* at 9, *Lucas v. Townsend*, 110 S. Ct. 858 (1990) (No. 89-400). (“This fundamental distinction—between a standard, practice, or procedure with respect to voting and a policy decision which does not concern voting—reflects Congress’s intent in enacting Section 5.”).

this merely begs the question whether a transfer of authority constitutes a change in "election law." They glean various other supposedly pertinent comments from decisions of this Court, but these references are equally unconvincing, particularly since they come from cases where the nexus to the conduct of elections was clear.²¹ Finally, we note that appellants' citations to various lower-court decisions are no more persuasive.²²

²¹ Appellants rely on *McCain v. Lybrand*, 465 U.S. 236 (1984). See Br. at 40. In that case, however, it was stipulated that section 5 applied. 465 U.S. at 250 n.17. This was not surprising, since the case involved a fundamental restructuring of a county government, including the creation of a new county council, the institution of local county elections for the first time, and a massive shift of control of governmental functions from the state legislature to new county government. *Id.* at 239-40. In a footnote, the Court listed various suggestions concerning changes that might need preclearance, including "the basic reallocation of authority from the state legislative delegation to the Council." *Id.* at 250 n.17. Obviously, such a comment cannot fairly be read as a definitive statement that a shift of authority among incumbent officials, without any other change affecting voting, requires preclearance.

The United States points to *City of Lockhart v. United States*, *supra*. Br. at 13-14. There, the city had added new seats to its council. The Court held that preclearance extended to existing seats as well as the new ones, reasoning that the existing seats had been changed by their loss of voting strength and were, in any event, "an integral part of the [new] council." 460 U.S. at 131. Here again, the Court's statement hardly stands for the notion that every shift of authority among officials must be precleared. The addition of new seats to a legislative body changes the fundamental nature of the existing positions and it makes sense, in such a case, to preclear the entire new arrangement. The same cannot be said when a particular responsibility is merely transferred among existing office holders.

²² Appellants and the United States cite four cases, three of which involved the creation of new governmental bodies with new selection procedures. See *County Council v. United States*, 555 F. Supp. 694, 700-02 (D.D.C. 1983) (shift of county governance from state legislature and governor to a new, elective county council); *Horry County v. United States*, 449 F. Supp. 990, 993-94 (D.D.C. 1978) (same); *Robinson v. Alabama State Dep't of Educ.*,

Also unavailing is the suggestion that the Court should simply defer to the government's current interpretation of section 5. While the United States is here urging reversal, it can hardly be said that this position reflects a longstanding or considered administrative interpretation of the statute. The Justice Department's regulation defining the scope of section 5, like this Court's prior decisions, is limited to matters that directly affect elections. See 28 C.F.R. § 51.13. This limitation, moreover, was not accidental. In promulgating the regulation in 1987, the Department stated the view that "some relocations of authority are covered by Section 5" and gave as its sole example the "implementation of 'home rule'"—*i.e.*, a massive shift of governmental powers from state to local government. 52 Fed. Reg. 486, 488 (1987). The Department then acknowledged that "we do not believe that a sufficiently clear principle has yet emerged distinguishing covered from noncovered reallocations to enable us to expand our list of illustrative examples in a helpful way." *Id.* Thus, after 22 years of administering the statute—during which time there have been a multitude of reallocations of authority in covered jurisdictions—the government was unwilling or unable to espouse a broad rule putting all of those changes in legal jeopardy.

652 F. Supp. 484, 485 (M.D. Ala. 1987) (shift of administration of city schools from county board, elected county-wide, to new city board, appointed by city council). All of these changes obviously had a direct impact on the electoral process.

In the fourth case, *Hardy v. Wallace*, 603 F. Supp. 174 (N.D. Ala. 1985), the court required preclearance of a shift of the power to appoint a key county board from the local legislative delegation to the governor. While this case did not involve as direct an impact on elections, the court emphasized the unique importance of the shift of power, adding that the "ordinary or routine legislative modification of the duties or authority of elected officials . . . probably [is] beyond the reach of section 5, even given its broadest interpretation." *Id.* at 178-79. As we note *infra*, the United States saw no need for preclearance in *Hardy*. *Id.* at 181.

The case-by-case application of section 5 by the Justice Department provides no greater support for such a broad rule. Although the United States now suggests that it has long interpreted section 5 to apply to cases like this one, the primary piece of evidence cited is a 1975 letter that itself involved the implementation of "home rule" in South Carolina.²³ More recently, in *Hardy v. Wallace*, 603 F. Supp. 174, 181 (N.D. Ala. 1985) (App. B to the court's opinion), the Department expressly distinguished such a "wholesale transfer of governmental power" in determining that section 5 was *not* triggered by a transfer of authority to appoint a county racing commission from the local legislative delegation to the Governor. It reasoned that while elected representatives had lost some of their authority, that change "neither remove[d] the vote from residents of [the] County, nor otherwise impede[d] or in any respect infringe[d] on resident voting rights." *Id.*²⁴

In sum, appellants' proposed rule requiring preclearance of all changes in the authority of elected officials would be a clear departure not only from the natural reading of the statute but also from the current state of the law. This Court has drawn a line between changes that directly affect the conduct of elections—and there-

²³ Br. at 16, 1a-2a. See generally *Horry County v. United States*, 449 F. Supp. at 993-94 (describing the relevant state legislation). Beyond this letter, the Government simply cites eight instances where it objected to "transfers of authority" under section 5. Br. at 16 n.6. Many of these cases also apparently involved implementation of home rule. In any event, it is unclear whether the applicability of section 5 was even disputed by the relevant governmental entity in any of these instances.

²⁴ If the United States now has a different view, and wants the Court to defer to that new view, it should at least demonstrate that it has thought through the consequences of its new position. Here, however, the brief filed by the government reflects no awareness of the massive scope of the expansion of the statutory mandate being proposed or the difficulties of applying section 5 outside the core context of election laws. See § II *infra*.

fore have an inherent potential for abridging voting rights—and changes in other aspects of governmental policy. There is no reason to alter that line here.

II. PRECLEARANCE WOULD BE AN UNWORKABLE AND UNNECESSARY REMEDY FOR DISCRIMINATION IN THE ALLOCATION OF GOVERNMENTAL POWERS.

Lacking support in the statutory language, legislative history, or relevant case law, appellants ultimately fall back on a policy argument. They contend that unless transfers of official authority are subject to preclearance, they will be used as subterfuges to frustrate the exercise of the electoral franchise by minorities. This argument does not make sense, for two reasons. First, requiring preclearance would itself be a wholly impractical, and ineffective, means of redressing reallocations of power that indirectly harm the interests of minorities. Moreover, other more suitable remedies are already available. Taken together, these factors make it even less likely that Congress intended section 5 of the Voting Rights Act to play a role in this kind of situation.

A. Appellants' Proposed Rule Is Unworkable.

As we understand it, the problem that would be addressed by the proposed expansion of section 5 arises when a shift of authority enhances the power of some officials (over whom minorities have relatively little influence) at the expense of other officials (over whom they have greater influence). See *Br. for the United States as Amicus Curiae* at 14 (“a jurisdiction could negate the election of a minority candidate to a governing body by taking away the official’s authority and reallocating it to other officials over whom minority voters have less influence”). While such a scenario is conceivable, appellants’ rule has little to recommend it as a means of dealing with this particular problem.

To begin with, it is probably impossible to overstate the magnitude of the expansion of the statutory mandate proposed here. In any given year, the number of pieces of legislation in covered jurisdictions affecting the authority of elected officials is obviously huge. For example, virtually every legislative budget for every department of a state government—along with many other pieces of substantive legislation—will, in some way, increase or decrease the discretion delegated to the Governor and thereby effect a transfer of “authority” between the legislature and the executive. Similarly, at the local level, almost any resolution that the Etowah County Commission could pass could in some way affect the exercise of executive powers delegated to one of the commissioners. Finally, almost any state law relating to some aspect of the operation of local government—*e.g.*, limiting local zoning power or enhancing local involvement in the regulation of health-care facilities—will enhance or decrease the authority of local elected officials.

All such changes, under appellants’ proposed rule, would have to be precleared—in order to uncover the handful of discriminatory reallocations of power that may occur in a given year. At the same time, a multitude of changes that have occurred without preclearance since 1965 would now suddenly be subject to legal challenge. Any such changes that remain in place would not be validated by the passage of time. *See McCain v. Lybrand*, 465 U.S. 236 (1984) (involving a challenge to a 1966 electoral change).

It is difficult to believe that Congress could have intended anything like this when it passed the Voting Rights Act. The sheer volume of the matters that would have to be precleared, in the sixty-day time period specified in section 5, would require a veritable army of federal reviewers.²⁵ Moreover, the inherent federalism con-

²⁵ *Cf.* S. Rep. No. 417, 97th Cong., 2d Sess. 15 (1982) (extension of *existing* preclearance requirements nationwide “would be an administrative nightmare for the Department of Justice”). Sig-

cerns raised by the preclearance mechanism would of course be magnified as the scope of the statute increases. *Cf. Dougherty County, Georgia, Bd. of Educ. v. White*, 439 U.S. at 48 (Powell, J., dissenting) (“Congress tempered the intrusion of the Federal Government into state affairs . . . by limiting the Act’s coverage to voting regulations.”) It is one thing to require advance federal approval of enactments in a discrete area—*i.e.*, voting—but quite another to require advance approval of every new law or practice that redistributes authority among state or local officials. Certainly, the Court should demand far more than has been offered here before attributing such a purpose to Congress.²⁶

But the problem is not only the magnitude of the enlargement of the statute proposed here. A rule requiring preclearance of every reallocation of authority would also create a morass of issues concerning which types of legislation actually have this effect. Take, for example, a state law substantively modifying a governmental program. Under appellants’ rule, covered jurisdictions, and ultimately the courts, would be required to determine whether such a law, by altering the terms on which the Governor is authorized to act, effected a net transfer of “authority” between the legislature and the executive.

nificantly, the procedure for administrative preclearance was added to the proposed Voting Rights Act only late in the legislative process. Prior to that time, a declaratory judgment was the only way provided in the bill to obtain clearance for changes in voting procedures. *See Harper v. Levi*, 520 F.2d 53, 65 (D.C. Cir. 1975). Appellants would ask the Court to believe that Congress for a time contemplated requiring a separate *lawsuit* prior to every change in the authority of officials in covered jurisdictions.

²⁶ In *Dougherty County, Georgia, Bd. of Educ. v. White*, 439 U.S. at 38-39, the Court pointed out that Congress had reenacted section 5, without substantive change, after the Court had adopted an expansive interpretation covering all matters affecting elections. Such an argument for legislative ratification cannot be made here, however, since no prior case could have alerted Congress to the extreme statutory interpretation now being proposed.

Similarly, as noted above, Etowah County's commissioners exercise various executive responsibilities for operations of road shops, the county courthouse, and the county farmers' market. The County might choose to switch these assignments or to delete one of them by hiring a professional manager answerable to the County Commission. It might merely modify the delegation of authority by requiring Commission approval of specific expenditures exceeding a given dollar amount. Here again, someone would have to determine whether the net result was a reduction in the "authority" of a given commissioner for purposes of section 5.

All of these problems would be the direct result of cutting section 5 loose from its original moorings as a measure regulating elections. The Court has now spent more than two decades working out the scope of the preclearance requirement in the electoral field. Under the approach proposed here, it would face the almost insuperable task of defining which changes in law or practice constitute reallocations of authority.

Appellants' proposed rule not only would create enormous burdens and uncertainties but also would fail to serve, in a coherent way, its stated purpose of ferreting out those few transfers of authority that may constitute subterfuges aimed at diluting the influence of minority voters. Appellants and the United States, while asking the Court to expand section 5 dramatically, say very little about how reallocations of authority should be evaluated under a provision that bars all changes having a purpose *or effect* of abridging the right to vote.²⁷ Such a broad standard may be workable in reviews of electoral changes.²⁸ It cannot, however, be intelligibly applied to reallocations of governmental authority.

²⁷ See 42 U.S.C. § 1973c (change may be approved only if it "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color").

²⁸ It has been argued, however, that the expansion of the scope of section 5 has already created difficulties with application of the

The United States suggests at one point that the Justice Department could make some assessment of the “responsiveness” of particular officials to minority concerns and would invalidate any new laws that have the effect of moving power from more responsive to less responsive officials. Br. at 20. But it is inconceivable that Congress intended to authorize the Department, in its unreviewable discretion,²⁹ to evaluate state and local legislation based on this kind of subjective standard. Moreover, it hardly makes sense to hinge the validity of a governmental restructuring on the attitudes of the particular individuals holding office at a given time.

A more objective approach would be to compare the racial composition of the constituencies of the officials or bodies losing and gaining power in a given reallocation of authority. The United States, however, expressly rejects such a test, arguing that preclearance should be required even where the relevant constituencies are identical. Br. at 19-20.

In any event, this version of an “effects” test would have consequences that make it equally unlikely that Congress meant to authorize it. It would freeze in place all distributions of authority involving officials with significantly different constituencies. A covered jurisdiction would be barred from moving duties or power, *for whatever reason*, from an official with more minority constituents to one with fewer. Thus, for example, if blacks were a majority of the voters in a particular county but not in the entire state, the effects test would prevent the state legislature from withdrawing any authority previously granted to that county’s government. At the county level as well, regardless of the reasons or circumstances, authority could be transferred only in one direction—toward

effects test, particularly in the area of assessing annexations. See Blumstein, *supra*, 69 Va. L. Rev. at 680-88.

²⁹ See *Morris v. Gressette*, 432 U.S. 491 (1977).

those commissioners who happened to have more minority constituents.

B. There Are Ample Alternative Remedies Available if Governmental Powers Are Reallocated for Discriminatory Reasons.

One final factor is also critical in determining the intent of Congress regarding the scope of section 5. Congress knew that this provision was not the sole available means of dealing with discriminatory acts by state and local government. In particular, it was fully aware that such discrimination may be redressed through conventional lawsuits. It created a discrete additional remedy for one problem—discrimination in voting—but did not intend that remedy to occupy the field and address all of the possible types of discrimination by a government. *See Allen v. State Bd. of Elections*, 393 U.S. at 556 (Congress “drafted an unusual, and in some aspects a severe, procedure for insuring that States would not discriminate on the basis of race in the enforcement of their voting laws”). Thus, here, the district court expressly left open appellant Presley’s challenge to the County’s budgetary procedures and practices under the Fourteenth Amendment and Title VI, 42 U.S.C. § 2000d. J.S. App. A-20 n.18.³⁰

These alternative remedies provide a far superior means of handling the problem that underlies appellants’ argument in this case. If the concern is that power or resources will be transferred based on the race of an official or of his constituents, then appropriate plaintiffs can prove such facts and obtain appropriate relief. *Cf. Vil-*

³⁰ The district court also left open the claim brought under section 2 of the Voting Rights Act. If the Court affirms the decision below, the validity of that claim will depend on whether section 2 can be read to have a broader scope than section 5, in those cases where it can be shown that a reallocation of power was designed to abridge voting rights.

lage of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264-68 (1977) (barring intentional discrimination in zoning); *Anderson v. Martin*, 375 U.S. 399, 404 (1964) (barring direct or indirect state efforts to discourage black candidates or to encourage racially motivated voting); *Hawkins v. Town of Shaw, Mississippi*, 437 F.2d 1286 (5th Cir. 1971) (barring racial discrimination in provision of paving and other municipal services).

Appellants' favored remedy, by contrast, would raise all of the problems already outlined—including the application of an "effects" test that makes no sense in this context. Moreover, it would likely be an ineffective means of preventing racially motivated transfers of authority. It is absurd to suggest that the Justice Department—faced with tens of thousands of submissions and a short time deadline—could successfully uncover the handful of cases where transfers of authority among officials constitute deliberate efforts to lessen minority influence.

In sum, consideration of the alternative remedies available for dealing with the problem that appellants seek to address makes it all the less likely that Congress intended section 5 to reach this far.

III. REQUIRING PRECLEARANCE IN THIS CASE WOULD BE PARTICULARLY INAPPROPRIATE, SINCE THE TRANSFER OF AUTHORITY AT ISSUE COULD NOT, BY ITS VERY NATURE, HAVE A SUBSTANTIAL IMPACT ON VOTING RIGHTS.

Appellants, in arguing for application of section 5 to reallocations of authority, make the assumption that all such changes have the same potential for abridging voting rights. The flaws in that assumption are revealed by an examination of two key features of the transfer of authority at issue here. First, this case involves the revocation by a legislative body of a discretionary delegation

of executive authority. Second, contrary to the assumption of the district court, this case does not involve a shift of power among officials with different constituencies. Because of these features, the transfer of authority could not, in principle, affect the interests of voters.³¹

A. Preclearance Should Not Be Required Where a Legislative Body Merely Alters the Amount of Discretion Delegated to an Executive Official.

Where, as here, a legislative body merely reduces the amount of discretion previously delegated by it to an executive official, it makes little sense to perceive any potential for abridgement of the voting rights of the executive official's constituents. The reason is that a revocable delegation of a particular function does not constitute a transfer of ultimate authority. A legislative body may choose, for a time, to limit its own involvement in the details of carrying out a particular function, but it can always step in to correct any perceived errors of administration. The "balance of power" between the legislature and the executive remains the same. It follows that, regardless of any changes in the level of delegated authority, voters retain the same power to influence the course of public policy, because the electoral process for selecting those with final authority is unchanged.³²

This case illustrates this principle well. Under Alabama law, control over the allocation of road funds and the

³¹ Thus, even if the court were inclined to leave open the possibility that some types of reallocations of authority may require preclearance, it would not make sense to extend the requirement to this type of case.

³² To be sure, we would not contend that a direct change in the procedures for electing an executive official would be exempted from preclearance on the ground that the official exercises only delegated authority. In such a case, the linkage to voting rights is clear. It makes sense to consider the locus of ultimate authority, however, where the claim is that a transfer of *power* has a *derivative* impact on voting rights.

supervision of road repairs and improvements belongs to the Etowah County Commission as a body. Ala. Code §§ 11-8-3, 23-1-80 (Michie 1990). Prior to 1987, some of these functions were delegated to individual commissioners. However, the Commission could, at any time, have overruled any spending decision made by an individual commissioner. It simply chose, in practice, to leave most of the administrative details to individual delegees.

After the common-fund resolution, the Commission became more involved in those details, voting collectively on county-wide spending priorities. Appellants argue that this change deprived individual commissioners of significant autonomous authority. This is true in one sense, but it is specious to maintain that this change entailed a transfer of electoral "influence" from voters in each district to voters in the County as a whole. Prior to the resolution, an individual commissioner administering road funds in his district acted essentially as an agent of the entire Commission. Thus, the decisive electoral "influence" was always in the hands of those who vote for the entire Commission.³³

Moreover, requiring preclearance in this kind of case would be pointless, since the legislature could always achieve the same result by another means that did not formally reallocate authority—*i.e.*, by cutting the executive's budget. This was the factor emphasized by the district court, which noted that an individual commissioner's "power to set the internal spending priorities

³³ For these reasons, the linkage to voting rights here is arguably *more* attenuated than in *Lucas v. Townscnd*, where, as noted above, this Court affirmed a ruling that preclearance was not required. 110 S. Ct. 858 (1990). *Lucas* is similar to this case because it involved an action by a public body affecting the degree of budgetary discretion exercised by others: voters were denied the right to pick and choose among capital projects when they were proposed as part of a single referendum question. There are two key differences, however. First, the public body's action had a direct impact on an *election*—*i.e.*, the referendum. Second, the voter's decision in the referendum was not an exercise of revocable delegated power.

of a given quantum of budget authority pales dramatically in comparison to the power to allocate the *amount* of such budget authority in the first place." J.S. App. A-19. Even assuming, as appellants argue, that the purpose of the common fund resolution could have been to assure that spending priorities would be established for the benefit of the white majority in the county at the expense of the black majority in appellant Presley's district, precisely the same result could have been achieved without any formal "reallocation" of executive authority. The district-by-district budgeting system could have been retained and funding for appellant Presley's district could either have been cut altogether or conditioned on his informal agreement to spend the money in ways favored by the other commissioners.³⁴

Thus, unless the Court is prepared to take yet another giant step—requiring preclearance of every change in budgetary priorities that might have the effect of diminishing the power of an executive official³⁵—there would

³⁴ In reality, of course, this entire theory about the motives of the other county commissioners makes no sense. Appellant Presley's district contains only .3% of county road mileage. J.A. 72. Prior to 1987, road funds, which could only be spent on road work, had been allocated to districts based roughly on their percentage of that road mileage. Hitt Depos. at 21. Thus, in fiscal year 1987-88, if the existing system had been left in place and Presley's district had received its proportional share of funds, it would have received only about \$3000 out of a total county road budget of more than \$1 million. See J.A. 72. There was therefore no real need to create a new system in order to divert funds to other areas. In any event, the record reflects that, in that year, appellant's district actually received seven times its proportional share of road funds. See *id.*

³⁵ But see Br. of the United States as *Amicus Curiae* at 12, *Board of Pub. Educ. and Orphanage for Bibb County v. Lucas*, 111 S. Ct. 2845 (1990), (No. 90-1167) ("The Voting Rights Act protects the right to vote; it does not address the content of substantive legislation unrelated to voting, such as what budget to approve or what programs to fund.").

be little purpose in a rule requiring federal review of explicit changes in the level of authority delegated by a legislature. Under that rule, the multitude of routine changes in delegated power would be easily approved. In those few cases where such changes have racial motives, however, legislators could simply act in a different way, by reallocating money rather than power. In such an instance, the only remedy would be the one that appellants should be required to pursue here—a lawsuit proving racial discrimination.

B. Preclearance Cannot Be Required Where Power Shifts Among Officials with the Same Constituencies.

In its opinion, the district court made a persuasive case for the principle that voting rights cannot be affected by a transfer of power among officials or bodies with the same voting constituency. J.S. App. A-10 to A-14. Unless there is a difference in the voter pool (or voting procedures) for different offices, it is hard to see how voters can gain or lose influence when power moves from one office to another. For this reason as well, it is specious to treat all transfers of power as if they were of equal concern.

As already noted, the United States argues that a shift of authority among officials with the same constituency should be reviewed, and may be invalidated, under section 5. In particular circumstances, it suggests, such a change may move power from a body that happens to be more responsive to minority concerns to one that is less responsive³⁶ or may have some other discriminatory purpose,

³⁶ Thus, it hypothesizes that minorities may have succeeded in electing a mayor of their choice "because of special circumstances" only to see power shifted to the city council. Br. at 19. It also describes an actual refusal to preclear a transfer of power from one county-based body (the legislative delegation) to another (the county council) based on findings that the legislators had historically been more responsive to minority concerns. Br. at 20.

such as retaliation against a given individual.³⁷ But such possibilities provide no basis for requiring preclearance under the Voting Rights Act. The sole purpose of that Act is to guarantee equal voting rights. As long as such equality is preserved—as it must be when power shifts among officials with the same constituency—then the possibility that some officials may be less attentive to minority concerns, or the possibility that the legislature may have some other illegal motive, provides no basis for requiring preclearance.³⁸

The district court chose not to apply this principle to the Etowah County common fund resolution. It apparently reasoned that the resolution withdrew power from two new commissioners from single-member districts and granted that authority to the Commission, which of course has a county-wide constituency. For two reasons, however, it is clear that, in so holding, the court was simply using an incorrect “benchmark.”

First, under the statute and implementing regulations, the preclearance requirement is triggered only by initiation of a new voting procedure “different from that in force or effect on” the applicable benchmark date—here, November 1, 1964. 42 U.S.C. § 1973c; 28 C.F.R. § 51.2 (defining “change affecting voting”). In Etowah County, on that benchmark date, all road operations were in the control of commissioners elected at large. Thus, if a different constituency is required before a transfer of authority can be deemed a “change affecting voting,” the proper comparison is between the situation after August 1987 (when the entire Commission set funding priorities)

³⁷ Br. at 20 (citing *Mobile* and *San Patricio* cases).

³⁸ See Br. of the United States as *Amicus Curiae* at 10, *Lucas v. Townsend*, *supra* (“The statute protects minorities against passage of substantive legislation adverse to their interests . . . only indirectly by protecting the effectiveness of their vote.”).

and November 1, 1964 (when individual commissioners with the same county-wide constituency played this role).³⁹

Moreover, even if the proper comparison were between the common fund resolution and the immediately preceding practices, it still would be true that there never was a relevant change in the constituency of those in control of road funds. As noted above, prior to 1986, all Etowah County commissioners were elected at large. Each administered a particular district's road budget. Pursuant to a consent decree, two new commissioners, including appellant Presley, were elected from single-member districts in December 1986. When they took office, they did not immediately receive allocations of road funds to administer in their districts. The old system, administered by the four incumbent commissioners, remained in place on an interim basis. Hitt Depos. 74-75. The common fund resolution then had the effect of transferring control over expenditures from the four incumbent at-large commissioners to the entire Commission.⁴⁰ In sum, at no time was control over expenditure of funds exerted by any official or body other than those elected by all county voters. To the contrary, the common fund resolution merely maintained the ability of voters county-wide to influence all road expenditures.

³⁹ The district court held that a "change" should be defined to include any departure from a previously precleared practice. J.S. App. A-9 to A-10. In effect, therefore, it held that the benchmark for triggering the statute itself may evolve. This holding was based on three district court decisions and on a citation to another regulation, 28 C.F.R. § 51.54(b)(1), which merely provides that in assessing the *merits* of a covered change, the benchmark is the most recent previous practice that has been precleared. These authorities do not justify ignoring the plain terms of the statute.

⁴⁰ The relevant comparison, for purposes of section 5, is between the new practice and the actual practice as it existed prior to the change. See *City of Lockhart v. United States*, 460 U.S. at 132-33.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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August 30, 1991

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OFFICE OF THE CLERK

In The
Supreme Court of the United States

October Term, 1991

LAWRENCE C. PRESLEY, individually and on behalf
of others similarly situated,

vs.

Appellant,

ETOWAH COUNTY COMMISSION,

Appellee.

ED PETER MACK and NATHANIAL GOSHA, III,
individually and on behalf of others
similarly situated,

vs.

Appellants,

RUSSELL COUNTY COMMISSION,

Appellee.

On Appeal From The United States District Court
For The Middle District Of Alabama

**BRIEF OF THE APPELLEE
RUSSELL COUNTY COMMISSION**

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August 1991

QUESTION PRESENTED

WHETHER LOCAL LEGISLATION WHICH MERELY SHIFTS MINISTERIAL ROAD DUTIES FROM INDIVIDUAL COUNTY COMMISSIONERS ELECTED AT LARGE TO A ROAD ENGINEER RESPONSIBLE TO THE COUNTY COMMISSION AS A WHOLE IS SUBJECT TO PRECLEARANCE UNDER SECTION 5 OF THE VOTING RIGHTS ACT?

PARTIES IN COURT BELOW

The parties in the court below at the time of the judgment were plaintiffs Ed Peter Mack, Nathaniel Gosha, III, Lawrence C. Presley, and defendants Russell County Commission and Etowah County Commission.

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OPINIONS BELOW

The opinion of the district court is unreported. The opinion of the district court is reproduced beginning at JS A-1.¹ The order denying the motion to alter or amend the judgment is reproduced beginning at JS A-42.

JURISDICTION

The district court denied the requested injunction on 1 August 1990 and denied the motion to alter or amend the judgment on 21 August 1990. The Appellants filed their respective Jurisdictional Statements in this Court on 16 October 1990. This appeal is taken under 28 U.S.C. § 1253.

STATUTORY PROVISIONS

The Fifteenth Amendment to the Constitution, 42 U.S.C. 1973, and 1973c² are set out in full in the Appendix to this brief.

STATEMENT OF THE CASE

Appellee totally rejects Appellants' Statement of the Case. Appellants are traveling on a totally false assumption

¹ Unless otherwise noted, references to "JS" may be found in the Appendix to *Appellants' Jurisdictional Statement* at the cited page.

² 42 U.S.C. 1973c is commonly known as "Section 5."

that prior to 1979, each commissioner had complete control of a virtually autonomous district, including a portion of the budget.

Prior to 1979, the road department of Russell County operated under a district or semi-district system. In 1979 the Russell County Commission consisted of five commission members. Two commissioners whose districts were contained within the city limits of Phenix City, Alabama had virtually nothing to do with *direct* supervision of road operations in the county since the roads and streets in their district were maintained by the Phenix City Road Department. The three commissioners whose districts lay outside of Phenix City were personally involved in the day-to-day management and direct supervisory aspects of the county road work in their district.³ (See A-14, Deposition of John Belk, p. 10). The districts were approximately the same size and contained approximately the same miles of rural roads. (See A-14, Deposition of John W. Belk, page 20.) All county road funds were budgeted for the county as a whole and were never divided between the districts. (See A-14, Deposition of

³ The streets and roads within the Phenix City, Alabama municipal limits are maintained from separate city and state funds under control of the municipality. In fact, 20% of Russell County's share of the State gasoline tax by general and local law goes to the municipalities. (Exhibit 3 to this defendant's Motion for Summary Judgment). Counties may, with consent of the city government, work on city streets. *Alabama Code*, 1975, § 23-1-86 (Michie 1986 Repl. Vol.). Since the case was submitted to the three-judge lower court on depositions and exhibits, there is no formal record. References herein to exhibits and depositions are from those submitted to the lower court.

John Belk, pp. 8, 9) The three shops were included in a single road budget always under the control of the entire county commission. (*See Id.*)

During the latter part of 1978 and early 1979, a Russell County grand jury conducted an investigation involving misuse of county equipment and personnel. As a result, one of the commissioners was indicted by the grand jury. The same grand jury recommended that the county adopt what is commonly known as the "Unit System". (*See A-14, Deposition of John W. Belk, page 8*). Under the Unit System, the county road department is operated, without regard to district lines, by the county engineer, a professional appointed by and responsible to the county commission. *See Alabama Code, 1975, § 11-6-1* (Michie 1986 Repl. Vol.). The duties of the county engineer are specified by state law (§ 11-6-3 of the *Code*).⁴ The Unit system is the system recommended by the Alabama's State Highway Department and other authorities. (*See A-16, Deposition of Charles Adams, pp. 13, 14*).⁵

Following the grand jury's investigation, indictment and recommendation, a member of Russell County's legislative delegation, Rep. Charles Adams, met with the

⁴ The specifications for county road engineer have been set out by statute in Alabama since 1939. *See Alabama Code, Title 12, § 69* (Michie 1940).

⁵ A copy of the pertinent portion of Auburn University Professor Lansford C. Bell's recommendation was attached as a part of Exhibit 1 to Russell County's response to the Justice Department in the Court below. The unit system or a modified version of the unit system is currently operating in 45 of Alabama's 67 counties.

county commission to encourage adoption of the Unit System for operating the county road department. During a meeting on May 18, 1979, the county commission passed a resolution reorganizing the road department under the Unit System "effective immediately". (Quoted by lower court's opinion. See Appellant's JS A-3).

Following the meeting of the county commission, Rep. Adams introduced House Bill 977 into the Alabama Legislature, which later became Act No. 79-652. (See A-4) This bill was introduced by Rep. Adams to prevent the county commission from deciding at a later date to reverse its resolution of May 18, 1979. (See A-16, page 9 of Deposition of Charles Adams).

Approximately seven years later, as a result of a consent decree entered March 17, 1986, in *Sumbry v. Russell County*, CV-84-T-1386-E, the county was redistricted into seven commission districts, three of which have a predominantly black population. Although past discrimination, based on unlawful dilution of black voting strength was alleged, no such finding was entered. Prior to *Sumbry*, the five commissioners, while residing in individual districts, were elected from the county "at large". *Sumbry* divided the county into seven districts and each commissioner is now elected by district. Two of the commissioners, Mack and Gosha, (Appellants in this case) are black and were elected in 1986,⁶ seven years after the contested legislation was enacted.

⁶ Mack and Gosha were elected to Districts 4 and 5 respectively. District 4 has 1.3 total miles of county-maintained roads or .2% ; District 5 has 73.92 miles of county-maintained roads or 13.8%. (See A-11, formerly Exhibit 3.B. to Defendants' Motion for Summary Judgment).

Appellants instituted an action in the United States Federal District Court, Middle District of Alabama, on May 5, 1989 alleging, *inter alia*, a violation of their voting rights pursuant to Section 2 of the Voting Rights Act of 1965. After amending their complaint twice (*Joint Appendix* pp. 15, 31), the Appellants, under the authority of 28 U.S.C. § 2284 (West 1978 & 1990 Supp.) requested a three-judge court to consider whether the Appellee's legislation converting the county to the unit road system was subject to the preclearance requirements of the Voting Rights Act, found in Section 5. Appellants' motion was granted and on August 1, 1990 the three-judge panel issued an order which found Russell County's 1979 enactments to be exempt from Section 5's preclearance requirements. (Before JOHNSON, Circuit Judge, HOBBS, Chief District Judge, and THOMPSON, District Judge. J. THOMPSON dissented.) It is this order which the Appellants have chosen to challenge before this Court. (The three-judge court's order is set out in full in *Appellants' Jurisdictional Statement Appendix*, beginning at A-1). Their appeal was docketed on October 26, 1990 and probable jurisdiction was noted on May 13, 1991.

SUMMARY OF ARGUMENT

The Court is called upon today to, once again, interpret the scope of the preclearance provisions, commonly known as § 5, of the Voting Rights Act of 1965. This section provides for federal preclearance of "changes" in "voting qualifications or prerequisites to voting, or

standards, practices, or procedures with respect to voting" not in effect on November 1, 1964. The purposes behind the Voting Rights Act, as well as its subsequent accomplishments, are certainly laudable. However, this Court should affirm the lower court's ruling that Russell County's conversion to the unitary road system is exempt from preclearance and that the application of § 5 is not without "limited compass."⁷

The Appellants are challenging Appellee Russell County Commission's 1979 legislative enactments which converted the county's road system from a district or semi-district system to a unitary system. This legislation shifted responsibility for day-to-day supervision of road authority in the rural districts from individual commissioners once elected at-large to a county road engineer appointed by the county commission as a whole.

The three-judge court below properly recognized that its role in assessing Russell County's 1979 legislation was to look for "potential for discrimination", the triggering mechanism of § 5. The court found that this local legislation, by which minor government powers are reallocated effecting no change in constituency, falls outside the purview of § 5.

The lower court's holding is clearly justified by the reasoning *implicit* in several Supreme Court cases and

⁷ This term is taken from Justice Harlan's concurrence and dissent in *Perkins v. Matthews*, 400 U.S. 379, 398 (1966).

explicit in several district court cases considering the "coverage" issue. This reasoning, termed by the Appellees a "change in constituency" analysis, contends that where minor powers are merely shuffled among government officials who are responsible to the same electorate or constituency, there simply is no potential for discrimination. This case can be contrasted with the "normal" § 5 case where the proposed change dramatically effects a shift in constituency, i.e., a switch from district elections to at-large elections.

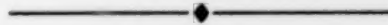
Moreover, the district court's ruling is clearly correct given Alabama's law characterizing the road duties in question as being purely ministerial. Since the Russell County Commission held general supervisory authority over the county road operations both before and after 1979, only shifting the delegation of routine ministerial duties, there really was no change in terms of the Voting Rights Act.

Additionally, the Alabama Middle District Court's ruling is supported by the statutory construction of § 5 and the legislative intent behind the Voting Rights Act. The impetus behind the Voting Rights Act was the elimination of obstacles to blacks exercising their right to vote, i.e., poll tests, and the augmentation of black voter registration. The act in general, and § 5 specifically, was intended to prevent such states from reimposing obstacles to black voter registration and was not intended to intrude upon the day-to-day operation of local governments.

Finally, in considering the reality behind the implementation of Russell County's unitary system in 1979, it

is significant that the plan advocated by the Appellants, equal distribution of road funds and resources between the districts regardless of need – though this has never been the law or practice in Russell County – would actually harm many black constituents. It is apparent that the Appellant's main complaint is simply a lack of discretionary funding to spend in their districts.

WHEREFORE, PREMISES CONSIDERED, the Appellee Russell County Commission requests that this Court affirm the lower court's ruling and hold that Russell County's 1979 legislation installing the unitary road system is exempt from the Voting Rights Act's preclearance requirements.



ARGUMENT

LOCAL LEGISLATION WHICH MERELY SHIFTS MINISTERIAL ROAD DUTIES FROM INDIVIDUAL COUNTY COMMISSIONERS ELECTED AT-LARGE TO A ROAD ENGINEER RESPONSIBLE TO THE COUNTY COMMISSION AS A WHOLE DOES NOT CONSTITUTE A "CHANGE" WITHIN THE MEANING OF SECTION 5 OF THE VOTING RIGHTS ACT AND THEREFORE DOES NOT REQUIRE PRECLEARANCE.

- A. The three-judge court correctly found that minor reallocations of local governmental powers among elected officials where there is no change in constituencies fall outside the purview of Section 5's preclearance requirements because there exists no potential for discrimination.**

The three-judge court below recognized that its duty was simply to determine whether the Russell County,

Alabama's 1979 road and bridge enactments constituted a change under § 5 of the Voting Rights Act of 1965⁸ creating a "potential for discrimination."⁹ JS A-8. After fully considering the facts before them and applying the relevant law, Alabama's Middle District concluded that a reallocation of local governmental authority which does not effect a "significant relative change in the powers exercised by government officials" and which does not change the constituencies to which the officials are responsible, is not a "change" within the meaning of § 5 of the Voting Rights Act. JS A-13, 14.

1. **The District Court's ruling is not inconsistent with prior Supreme Court cases defining the scope of § 5 coverage.**

While never having addressed the specific issue of whether § 5 would require preclearance of routine reallocations of ministerial governmental duties which result in no change in constituency, this Court has certainly left the door open for the formulation of a "change in constituency limitation" in § 5 coverage. In 1984, the factual backdrop of *McCain v. Lybrand*, 465 U.S. 236, set the stage for the Court to determine whether § 5 applied to minor

⁸ Section 5 has been encoded at 42 U.S.C. § 1973c, hereafter "§ 5". Section 5 is reprinted in full at A-3.

⁹ Appellants' contention that the three-judge panel below exceeded its scope of review looking past the threshold coverage inquiry of "potential for discrimination" into substantive considerations is insupportable. Even a cursory review of the lower decision indicates that the court did not deviate from accepted Section 5 modes of analysis.

reallocations of power, including jurisdiction over roads, and the impact of a change in constituencies. *Id.* at 239. Unfortunately, because the contested South Carolina act put into force more substantial changes (conceded to come within § 5's coverage), and the main issue focused upon an interpretation of previous Justice Department preclearance approval, the Court never reached the minor reallocations of power enacted by the South Carolina legislation nor the impact of a change in constituency. *See Id.* at 250 n.17. Such questions were left by this Court, somewhat prophetically, for "future proceedings." *Id.* at 250 n.17.¹⁰

Whereas this honorable Court may have never used the term "change in constituencies", many of this Court's § 5 rulings appear to be, in fact, rooted in a "change in constituency" analysis. For example, when a suspect political subdivision converts from district representation to at-large representation, the "change" creates a potential for discrimination because "[v]oters who are members of a racial minority might well be in the majority in one district, but in a decided minority in the county as a whole." *Allen v. State Board of Elections*, 393 U.S. 544, 569 (1969). Justice Stewart conducted a similar analysis in *Georgia v. United States*, 411 U.S. 526, 534 (1973), where he framed the coverage issue to be "whether such changes [single member to multimember districts] have the potential for diluting the value of the Negro vote." To state the obvious: the potential for vote dilution arises when there

¹⁰ The Court's meaning was of course that the questions listed would be addressed by the district court upon remand.

is a change in constituencies. Clearly, Chief Justice Warren and Justice Stewart engaged in what the Appellee has termed, for want of a better expression, a "change in constituency" analysis.

Similarly, reapportionment and annexation schemes fall within § 5 because their very purpose is to change the makeup of a constituency, thereby creating a potential for minority voting strength dilution. See *McDaniel v. Sanchez*, 452 U.S. 130, 134 (1981) (reapportionment); and *Perkins v. Matthews*, 400 U.S. 379, 388 (1971) (annexation); accord, *Pleasant Grove v. United States*, 479 U.S. 462, 467 (1987), and *Richmond v. United States*, 422 U.S. 358, 362 (1975).

The remaining § 5 coverage cases decided by this Court have addressed legislation of the nature which discourages minority candidates from seeking elective office, thus making the minority's vote ineffective, see, e.g., *Dougherty County Board of Education v. White*, 439 U.S. 32, 37 (1978) (rule requiring Board of Education employees seeking elective office to take unpaid leave of absence during campaign periods), and *Hadnott v. Amos*, 394 U.S. 358, 362-65 (1969) (practice requiring minority candidates to undergo obstacles not required for white candidates). The Alabama District Court specifically found that this line of cases was "basically inapposite" and factually distinguishable from the Appellants' situation in the present case. See JS A-15, n.14.

2. The District Court's ruling is consistent with previous district court decisions which emphasize the presence of a change in constituencies as being evidence of potential for discrimination.

Following this Court's lead in conducting what was, in essence, a "change of constituency" analysis, *see supra*, the lower courts coined the phrase "different constituencies" or "changed . . . constituency", finding the analysis quite helpful in resolving § 5 coverage close calls. Apparently, the first district court case to explicitly rely upon a "change in constituency" analysis to define § 5's scope was *Horry County v. United States*, 449 F.Supp. 990, 995 (D.C.D.C. 1978). The court explained that,

An alternate reason for subjecting the new method of selecting the Horry County governing body to Section 5 preclearance is that the change involved reallocates governmental powers among elected officials voted upon by different constituencies. Such changes necessarily affect the voting rights of the citizens of Horry County, and must be subjected to Section 5 requirements. *Cf. Perkins v. Matthews, supra; Allen v. State Board of Elections, supra.*

Id. Note that the three-judge district court did not see themselves as formulating a "novel" § 5 coverage theory; rather, the court was simply relying upon the Supreme Court's reasoning in *Perkins* and *Allen, supra*. *See Id.*

The "different constituency" paradigm was elevated from "an alternate reason for subjecting . . . [a change] . . . to Section 5 preclearance", *Id.* (emphasis added), to "the most relevant attribute of the challenged act" in *Hardy v. Wallace*, 603 F.Supp. 174, 178 (N.D. Ala.

1985) (emphasis added). In *Hardy*, the change in constituencies and resultant discriminatory potential created by Alabama's Act No. 507 in 1983 is quite illustrative of why the "change in constituency" analysis is so particularly effective in assessing § 5 coverage. In 1975, the Alabama legislature created the Greene County Racing Commission whose members were to be appointed by the all white legislative delegation representing Greene County at the time. *Id.* at 175. The powers of the commission were significant since the county racetrack would become the county's largest employer and would be responsible for 63% of the county's tax revenue. *Id.* at 176. In 1983, when it became clear that a reapportionment plan gave blacks the power to elect black candidates to the Greene County legislative delegation,¹¹ the Alabama legislature responded by transferring the power to appoint racing commission members from the Greene County legislative delegation to the Governor of Alabama, George Wallace, a white male. The "potential" for discrimination existed because the appointive powers and its corresponding influence were taken away from the legislative delegation responsible to the majority black Greene County voters and bestowed upon a governor who was responsible to the state-wide voters, 99% exclusive of Greene County voters and majority white in makeup. *Id.* at 176, 179.

The most recent district court decision overtly relying on a "change of constituency" analysis is *Robinson v.*

¹¹ Compare the timing of this legislation with Russell County's 1979 reallocation of day-to-day road and bridge authority which occurred *seven years* before appellants Mack and Gosha or any other black was elected to the Russell County Commission.

Alabama State Board of Education, 652 F.Supp. 484 (M.D. Ala. 1987) (three-judge panel). The district court was called upon to analyze Perry County's shift in Marion city school authority from a county board of education elected county-wide by a black majority to a city board of education appointed by Marion City Council members who were, in turn, elected by the city's white majority. *Id.* at 485. The panel's order, drafted by Judge Thompson¹², extended § 5 coverage "[f]irst," because "the resolution changed the constituency that selected those who supervised and controlled public schools within the city." *Id.* at 486 (emphasis in original). The court continued to explain that "[p]rior to the resolution, county voters elected the board members who controlled public schools in the city; under the resolution, however, the city council selected the board members who controlled city schools." *Id.* (emphasis in original).

The common denominator in *Horry*, *Hardy* and *Robinson*,¹³ all cases where § 5 coverage was extended, is a potential for discrimination which arises out of a change in constituencies whereby minority voting strength can be either overtly or covertly diluted. This "relevant attribute"¹⁴ is conspicuously absent from the Russell County legislation in the case at bar. Before 1964 and up until

¹² Judge Thompson, ironically, was a dissenter in the lower court's ruling in the case at bar.

¹³ Arguably, *County Council of Sumter County, South Carolina v. United States*, 555 F.Supp. 694 (D.C.D.C. 1983) relies on a change in constituency analysis for its holding also but not as explicitly as *Horry*, *Hardy*, and *Robinson*.

¹⁴ This term is taken from *Hardy v. Wallace*, *supra*, at 178.

1979, the county commission as a whole held general supervisory authority over the county road system and delegated direct or day-to-day supervision of the road system to three rural district county commissioners *elected at large* and responsible to the *county as a whole*. The 1979 enactments maintained the vestment of general supervisory authority in the Russell County Commission, but delegated the direct or day-to-day authority over county road operations to a professional county engineer appointed by, and under the authority of the same county commission. The three judge panel put it most succinctly when it found that "[b]oth before and after the 1979 change, the official responsible for road operations in each district was elected by, or responsible to, all the voters of the county." JS A-16.

While *Horry*, *Hardy* and *Robinson* all use the constituency analysis to *extend* § 5's coverage, Judge Vance implicitly recognized in *Hardy* that the same reasoning could be used to *limit* § 5 coverage when he, in dictum, opined:

The ordinary or routine legislative modification of the duties or authority of elected officials or changes by law or ordinance in the makeup, authority or means of selection of the vast majority of local appointed boards, commissions and agencies probably are beyond the reach of section 5, even given its broadest interpretation.

Hardy at 178, 179. The instant lower court in its wisdom recognized the Russell County scenario as the vehicle in which Judge Vance's cautionary dictum in *Hardy* would ripen into a ruling.

3. The District Court's ruling is consistent with prior positions held by the Justice Department emphasizing change in constituencies as indicative of potential for discrimination.

While the Justice Department has decided to support the Appellants in the instant case, their position generally upon reallocation of authority and the impact of a change in constituency is far from settled. This conclusion is evident not only from the Department's failure to promulgate applicable regulations on the subject, *see* JS A-15, but also from its position in earlier cases which is contrary to its stand today. As recently as 1985, the United States Attorney General wrote the Alabama Attorney General concerning the *Hardy* legislation, described *supra*. The Justice Department first objected, then withdrew its objection to the *Hardy* legislation stating, "[i]t is certainly not the case that every reallocation of governmental power is covered by Section 5."¹⁵ *See* Appendix B to *Hardy v. Wallace*, 603 F.Supp. at 181. While the Justice Department may claim that its position in *Hardy* favoring such a § 5 limitation is merely a recent aberration, the truth is that as early as 1969 the Department embraced the position that, "Section 5 applies to laws [that] substantially change the constituency of certain officials" *Perkins v. Matthews*, 400 U.S. at 391, n.10, quoting the Justice Department's *amicus* brief in *Fairley v. Patterson*, 393 U.S. 544 (1969). From any fair reading of the Justice

¹⁵ It appears that, to some extent, it was *Hardy v. Wallace* that led Alabama's Attorney General to decide that it was unnecessary to submit Russell County's legislation for federal preclearance. (Stipulated Testimony of Lynda K. Oswald, A-10). The unit system or modified unit system is currently operating in 45 of Alabama's 67 counties.

Department's position in both *Hardy* and *Fairley*, one is caused to wonder why the Department did not choose to write its *amicus* brief in favor of Appellee.

- B. The County Commission by state law has always held general supervisory authority over the county road system and therefore, the delegation of "ministerial" road and bridge duties to an appointed county road engineer does not effect a "change" within the meaning of Section 5.

While the Alabama District Court focused on the linkage between changes in constituency and potential for discrimination, the Appellee has, throughout the proceedings, asserted a subtly different additional ground for the denial of § 5 coverage in this case: given Alabama's history of investing the county commission with ultimate or general supervisory authority over county road operations, the 1979 Russell County enactments simply did not effect a "change" within the meaning of § 5. A comparison with the ruling of the district court is helpful. The district court found, in terms of constituency, "[b]oth before and after the 1979 change, the official responsible for road operations in each district was elected by, or responsible to, all the voters of the county. Thus, there was no *change* in potential for discrimination against minority voters." JS A-16 (emphasis in original). The Appellee's proffered alternative ground is similar. Both before and after 1979, the county commission was clothed with the ultimate authority over county road and bridge systems. The fact that in 1979 ministerial or administrative road duties once delegated to rural district commissioners were rerouted to a county employee, the county engineer, is irrelevant in terms of § 5.

1. Under Alabama law the county commission acting as a unit has always been vested with general supervisory authority over the county's road system with the power to delegate administrative or ministerial duties to subordinates.

The appellants have attempted to convince the Court that prior to 1979 Russell County commissioners were autonomous road bosses who reigned sovereignly over their road district "fiefdoms". While this has never been the *practice* in Russell County or anywhere in Alabama; more significantly, it has never been the *law* in Alabama.^{16 17} Although admittedly the rural district commissioners exercised direct supervision¹⁸ over his residency district's road maintenance, the county commission has always been entrusted with "general superintendence of public roads and bridges." See *Court of Commissioners of Pike County v. Johnson*, 229 Ala. 417, 419, 157 So. 481

¹⁶ The relevant sections of Alabama's code which describe the road and bridge authority of the county commission and what authority, duties, or functions may be delegated to a county road engineer or supervisor are set out in Appellee's appendix. See A-5, *Alabama Code*, 1975, § 23-1-80 (Michie 1986 Repl. Vol.) and A-8, *Alabama Code*, 1975, § 11-6-3 (Michie 1989 Repl. Vol.)

¹⁷ In other contexts, this Court has looked to state law to determine the authority and function of local officials, *see, e.g., St. Louis v. Praprotnick*, 485 U.S. 112, 124 (1988) (Section 1983).

¹⁸ Appellee employs the term "direct supervision" to mean day-to-day responsibility for completion of tasks and overseeing of workers as opposed to "general supervision" which denotes a responsibility for the formulation of long range objectives and major budget allocations.

(1934). Any duty or power held by the individual district commissioner was "*administrative* in character" and would be "*subordinate to, in co-operation with, and in aid of this court [of commissioners], which is still vested with general jurisdiction and supervision. . . .*" *Id.* at 420 (emphasis added). The state's supreme court in *Court of Commissioners* unequivocally rejected the notion of autonomous district commissioners.

. . . [T]here was no intention to transfer these governmental powers from the governing body of the county and vest them in the commissioner of each district. Such construction would destroy the unity of county government, and set up several rival government units of one man each, which, with undefined powers, would lead to great confusion.

Id. at 419. Clearly, no individual commissioner wielded the kind of autonomy over road and bridge matters, even within his residency district, that is suggested by Appellants.

Further, the creation of the post of county road engineer who would be responsible for direct supervision of road construction and maintenance took nothing away from the county commission in terms of road and bridge authority. In *Thompson v. Chilton County*, 236 Ala. 142, 181 So.701 (1938), Alabama's Supreme Court interpreted a statute apparently very similar to the 1979 Russell County legislation at issue. The *Thompson* opinion described the limitations of the county road supervisor's authority (precursor to the county road engineer) in terms virtually identical to *Court of Commissioner's*

description of an individual commissioner's road authority limitations, *supra*.

To be sure the Road Supervisor is charged with the duty of supervising the construction, maintenance and repairing the public roads in said county, but this does not mean that he displaces, in this respect, the Court of County Commissioners. . . . This supervisor is required to be a civil engineer, and his duties and authority in no wise conflict with the general powers of the court [of commissioners]. He is in immediate charge of the construction, maintenance and repair of the roads, but his duties are *purely ministerial*, and *subordinate* to the Court of County Commissioners.

Thompson at 145 (emphasis added).

If the pre-1979 district commissioner exercised only "administrative" road duties which were "subordinate to" the county commission's road superintendence and the post-1979 county engineer can only exercise "purely ministerial" functions "subordinate to" county commission road authority, there was no "change" which could trigger preclearance under § 5. The county commission as a whole as well as each individual commissioner maintained the *same* general supervisory superintendence powers before 1979 as they did after 1979. There simply was no change in the substantive powers held by the commission.

2. The delegation of administrative or ministerial duties comes within the "administrative or ministerial exception" implicit in section 5 coverage decisions.

Although neither this Court nor any district court has explicitly relied upon an "administrative or ministerial exception" to limit the coverage of § 5, the framework has been laid for the formulation of such an exception. In *McCain v. Lybrand*,¹⁹ 465 U.S. at 239, this Court considered the description of a county commission's powers as "administrative and ministerial" significant enough to note the description within its opinion. The Court never was presented with the opportunity to comment upon the impact such a designation might have on § 5 coverage because of the procedural posture of the case.²⁰ In *NAACP v. Hampton County Election Comm.*, 470 U.S. 166, 175 (1985), this Court extended § 5 coverage to legislation creating a two week filing period for a school district election to be held six months later. The lower court found that preclearance was unnecessary because "the scheduling of the election and the filing period were ministerial acts necessary to accomplish the statute's purpose." *Id.* at 174 (internal quotation marks omitted) (emphasis added). Interestingly, this Court, in striking down the lower decision, did *not* hold that there was no

¹⁹ *McCain* is discussed in a slightly different context *supra*, in part A.

²⁰ Besides the fact that the contested legislation in *McCain* enacted numerous "changes" in voting practices conceded to fall within the ambit of Section 5, *See McCain* at 239-240, 250 n.18, the primary issue before the court involved the interpretation of the Justice Department's approval of an earlier submission. *Id.* at 239.

"ministerial exception" – though the opportunity to do so was clearly before the court. Rather, the Court rejected the lower court's *characterization* of the acts as ministerial in light of the Voting Rights Act's objectives. *Id.* at 175.²¹

Similarly, in *Robinson v. Alabama State Board of Education*, *supra*, 652 F.Supp. at 486, the three-judge federal court from Alabama addressed a "change" in city school authority which the defendants characterized as merely "administrative" in nature. Again, the door was open for the court to rule that there simply was no "administrative exception" within § 5. The *Robinson* court, mimicking *NAACP*, chose not to do so; but instead, disagreed "with the defendants' characterization." *Id.* It is certainly not unreasonable to conclude from the *NAACP* and *Robinson* holdings, that in the right factual context, an act which can be *fairly characterized* as ministerial or administrative *may not* require preclearance under § 5.

Therefore, in the case at bar, where the challenged acts can be fairly characterized as "ministerial" or "administrative"²², the right fact situation is before the Court to explicitly recognize an exception that has to this point remained implicit. This Court should hold that the

²¹ The Court did rule that "minor alterations" in voting practices were not exempt from Section 5. *NAACP* at 176. Appellee's reading of the ruling in *NAACP* is justified on the ground that while the terms "minor" and "ministerial" are similar, they are not synonymous.

²² Appellee would go so far as to assert that the designation of the road authority in question has been *conclusively* characterized as "ministerial" or "administrative" by the Alabama Supreme Court cases cited *supra*.

daily supervisory responsibility over a county's road maintenance program is clearly ministerial or administrative in nature and therefore should be excluded from the "potential severity"²³ of § 5 preclearance burdens.

- C. **The Voting Rights Act was "aimed" at voter registration and was never intended to introduce the heavy hand of federal scrutiny into routine local enactments which have no apparent nor real impact upon minority voting rights.**

On August 6, 1965, the legislation commonly known as The Voting Rights Act went into effect. This legislation, passed by Congress pursuant to § 2 of the Fifteenth Amendment to the United States Constitution²⁴ mandated that,

No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1793b(f) (2) of this title.

42 U.S.C. § 1973. The task of this Court today is to interpret the meaning and intent behind one of the many enforcement provisions of the Voting Rights Act, § 5, the

²³ This term is taken from *Morris v. Gressette*, 432 U.S. 491, 504 (1977).

²⁴ The text of the 15th Amendment is set out, in full, at A-1.

preclearance provision. This section mandates preclearance or prior approval to be sought and obtained from the United States Attorney General or the Federal District Court of the District of Columbia "[w]henver a [suspect] State or political subdivision . . . shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964" 42 U.S.C. § 1973c.

While it is one thing to convey to Congress an intent to give the Voting Rights Act "the broadest possible scope"²⁵ of application; it is quite another matter to emasculate the section of any meaningful limit.²⁶ Although this Court has never been confronted with the right facts justifying § 5's limitation, such does not indicate that the provision is without boundary. Arguably, this Court has never had the occasion to comment upon legislation, like the 1979 Russell County enactments, which have such a *de minimis* (if any) impact on voting rights. Certainly, this Court has described the breadth of § 5 in sweeping terms; however, these descriptions of § 5 must be interpreted in the context of the facts before the Court. In each case, the Court was addressing legislation that had a clear and undeniable impact on minority voting strength. For instance, the opinions in *Katzenbach*, *Allen* and *Perkins* arose out of patent attempts by a political subdivision to dilute minority voting strength: voter registration tests

²⁵ *Allen v. State Board of Elections*, 393 U.S. at 565.

²⁶ See *Perkins v. Matthews*, 400 U.S. at 398 (J. Harlan concurring in part and dissenting in part).

and devices,²⁷ shifts from district to at-large representation,²⁸ and annexations.²⁹ Admittedly, *Hadnott*³⁰ and *Dougherty County*³¹ took this Court's interpretation of § 5 one step further when it applied § 5 to legislation discouraging minority candidacy. Russell County's enactments present something totally new: a challenge to legislation which has no discernible impact on minority voting practices, procedures or patterns. The idea that these changes, like the ones in *Dougherty*, "reduce[d] in some manner the autonomy or political potency of . . . the county commissioners in Russell . . . Count[y]" is plainly inconsistent with an appreciation of the facts in this case, as found by the three judge panel. See JS A-15 at n.14.

The most relevant indication of the intent of the 89th Congress in drafting this legislation, the text itself, plainly places the emphasis on *voting* qualifications, prerequisites, and *voting* standards, practices or procedures. See 42 U.S.C § 1973. The phrase "any voting standard, practice, or procedure with respect to voting" must be interpreted in this light. See 42 U.S.C. § 1973c. The phrase "with respect to voting" only has meaning within the context of *voting* qualifications, prerequisites, standards, practices or procedures. The farther one gets away from

²⁷ *South Carolina v. Katzenbach*, 383 U.S. 301, 329-30 (1966). This case was a bill in equity which challenged the constitutionality of the Voting Rights Act in its entirety.

²⁸ *Allen*, 393 U.S. at 569.

²⁹ *Perkins v. Matthews*, 400 U.S. at 387, 388.

³⁰ *Hadnott*, 394 U.S. 358, 362-365.

³¹ *Dougherty County v. Board of Education*, 439 U.S. 32, 37.

the items listed in § 1973, the more tenuous is the application of § 1973c,³² even though there is some, broadly defined impact upon voting. To give the phrase "with respect to voting" any other meaning is to presume the 89th Congress intended the absurd³³ – the Voting Rights Act would apply to *every* local law, ordinance, or regulation virtually without exception, because it had an "impact" on minority voting strength.

Appellee's reading of § 1973c, in light of § 1973, is equally supported by sources of legislative intent outside the text. Attorney General Katzenbach, who is widely recognized to have played a large role in the drafting and passage of the Voting Rights Act, stressed that the "bill

³² The rule of construction, *Ejusdem generis*, is applicable here. *Black's Law Dictionary* defines *Ejusdem generis* as:

Of the same kind, class, or nature. In the construction of laws, wills, and other instruments, the "ejusdem generis rule" is, that where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind of class as those specifically mentioned

³³ Attributing to Congress such a presumption is in direct contravention of normal rules of statutory construction. See 82 C.J.S. *Statutes*, § 316 (1953).

really is aimed at getting people registered. . . ."³⁴ 1965 House hearings 21, cited in *Hardy v. Wallace*, 603 F.Supp. 174, 182 (J. Propst concurring). Senator Jacob Javits, one of the principal sponsors of the Voting Rights Act, explained that § 5's purpose was to prevent states from substituting new methods of voting qualifications and procedures for proscribed tests and devices suspended by § 4.³⁵ Another principle advocate, Senator Tydings, on the same day, explained that the suspension of voting tests and appointment of Federal examiners were "the heart of the bill."³⁶

³⁴ Assistant Attorney General Burke Marshall concurred. In House hearings, he answered a congressman's question by stating, "the problem that the bill was aimed at was the problem of registration, Congressman. If there is a problem of another sort, I would like to see it corrected, but that is not what we were trying to deal with in the bill." Hearings on H.R. 6400 before subcommittee No. 5 of the House Committee on the Judiciary, 89th Cong., first session, page 74.

³⁵ Senator Javits commented that,

Section 5 deals with attempts by States or political subdivisions whose tests or devices have been suspended under Section 4 to alter voting qualifications and procedures which were in effect on November 1, 1964. Section 5 permits a State or political subdivision to enforce new requirements only if it submits the new requirements to the Attorney General and the Attorney General does interpose objections within sixty days thereafter.

111 Cong. Rec. 8363 (daily ed. April 23, 1965).

³⁶ 111 Cong. Rec. 8366 (daily ed. April 23, 1965).

It was not the intent of Congress to intrude upon local legislative processes far removed from any colorable impact upon voting rights. Bill proponent Senator Javits protested that the act was "not introduced to federalize the voting process, but to aid the disenfranchised American to exercise the franchise." *Id.* at 8363. When Congress extended application of the Voting Rights Act in 1982, the official Senate report stated that Congress had originally intended for the act to "cover voting rights while allowing the legitimate processes of government to go on."³⁷

Therefore, this Court should, while maintaining § 5's broad application to *voting* practices, reject the Appellants' all encompassing interpretation of § 5 which provides no reasonable limit to its coverage. Affirmation of the lower court's ruling is proper, if for no other reason, because, "[t]he language of section 5 clearly provides that it applies only to proposed changes in voting procedures." *Beer v. United States*, 425 U.S. 130, 138 (1976).

D. Russell County's 1979 enactments not only lack a "potential for discrimination" as found by the three-judge panel; in reality, the conversion to the unitary road system actually brings the most benefit to Russell County's black constituents.

While a three-judge panel may, in the abstract, opine that the motive behind and the actual effect of a challenged enactment are "irrelevanc[ies]", *Turner v. Webster*, 637 F.Supp. 1089, 1092 (N.D. Ala. 1986) (three-judge

³⁷ S. Rep. No. 417, 97th Congress, Second Session (1982) at 8.

court), this Court has said that Section 5's main concern is "the reality of changed practices as they affect Negro voters." *See Georgia v. United States*, 411 U.S. 526, 531 (1973). In other words, though the judiciary's responsibility in determining § 5 coverage is to focus upon the "potential for discrimination" and not the substantive aspects of the Voting Rights Act; in assessing the "potential for discrimination", it is necessary to have an appreciation of the facts surrounding Russell County's 1979 enactments.

The "reality" behind Russell County's 1979 "changed practices" is simple: the people of Russell County made a decision that the unitary road maintenance system was superior to the district system of road management. The district system had generated duplication and waste, lacked accountability and invited corruption. As a direct response to the indictment of a county commission for abuse of his office, the choice for the unitary system was made – all this nearly seven years *before* a black candidate was elected to the Russell County Commission. Governmental integrity benefits black constituents as well as white. The Appellants have strained to implicate some sort of racial animus in a situation where it just does not exist.

Further, Appellants Mack and Gosha apparently do not have a problem with the unitary system as much as they want "discretionary funds" to spend in their districts.³⁸ Both Mack and Gosha voted in favor of the road budgets.³⁹ Their common complaint is that they do not

³⁸ See A-18, Deposition of Nathaniel Gosha, pages 35, 36, 82, 84 and see A-21, Deposition of Jerome Gray, page 21. Jerome Gray is the Field Director for the Alabama Democratic Conference, the black caucus of the Alabama Democratic Party.

³⁹ See A-18, Deposition of Nathaniel Gosha, page 17 and A-20, Deposition of Ed Mack, page 17.

have an "equal share" of revenue to spend in their districts. Such political dilemmas – so completely devoid of racial overtones – are not the "stuff" of which Voting Rights Act challenges are made.

Finally, it is interesting to note that the plan advocated by Appellants to divide road funds equally between the districts, regardless of need, would actually be less beneficial to most black Russell County constituents. District 7, one of the more heavily populated rural districts and containing almost 60% of the county's roads⁴⁰, is predominantly black though their chosen representative Commissioner Allen is white. Thus, Appellants' plan to equally divide road resources regardless of need would actually take away resources from this majority black district.

- E. The three-judge panel, while according the deference due to the Justice Department's position, properly and prudently chose to override the Justice Department's position and rule in the favor of the Russell County Commission.**

Certainly, the position of the Justice Department is to be accorded considerable deference due to the major role it played in the drafting of § 5; yet, its view is not dispositively binding upon a three-judge court's determination of § 5 coverage cases. *Lucas v. Townsend*, 698 F.Supp. 909, 911 (M.D. Ga. 1988). It is not rare for a court, after carefully considering the Department's position, to

⁴⁰ District 5, represented by Appellant Mack, has 13.8% of the county roads. District 4, represented by Appellant Gosha, has only 1.3 miles of county roads within its borders. See breakdown of road mileage by district in A-11.

reject the Department's leading and make what it views to be the most accurate application of § 5. *See, e.g., Hardy v. Wallace*, 603 F.Supp. 174, 177, n.5 and 181-182.

The instant three-judge panel carefully weighed the Attorney General's opinion but because the department's position on the matter had not been settled enough even to promulgate new regulations for guidance in this area, the court felt justified to make an independent judgment of the issues presented. JS A-15.

CONCLUSION

Based upon the foregoing, Appellee request that this court affirm the lower court's holding which found the Appellee Russell County Commission exempt from the preclearance requirements of § 5 of the Voting Rights Act of 1965.

Respectfully submitted,

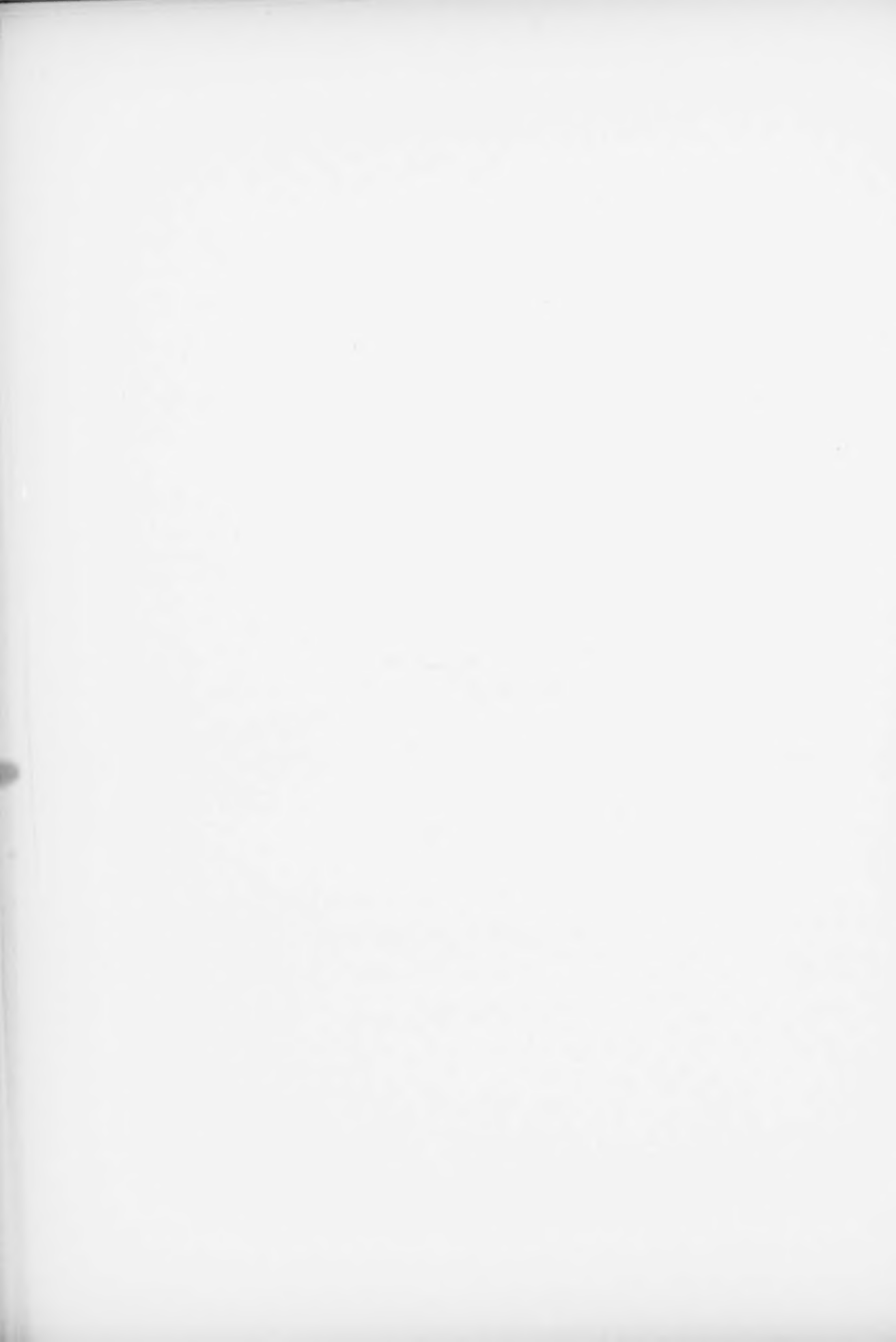
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FIFTEENTH AMENDMENT TO THE U.S. CONSTITUTION

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

42 U.S.C.A. § 1973 (West 1981)

No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title.

42 U.S.C.A. § 1973c (West 1981)

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting

qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if

the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

Act No. 79-652

H. 977 - Adams (C), Whatley

AN ACT

Relating to Russell County: to provide that all functions, duties and responsibilities for the construction, maintenance and repair of public roads, highways, bridges and ferries in the county shall be vested in the county engineer and shall be maintained on the basis of the county as a whole, without regard to district or beat lines, and to prescribe certain duties for the county engineer.

Be It Enacted by the Legislature of Alabama:

Section 1. All functions, duties and responsibilities for the construction, maintenance and repair of public roads, highways, bridges and ferries in Russell County are hereby vested in the county engineer, who shall, insofar as possible, construct and maintain such roads, highways, bridges and ferries on the basis of the county as a whole or as a unit, without regard to district or beat lines.

Section 2. The county engineer shall assume the following duties, but shall not be limited to such duties:

(1) to employ, supervise and direct all such assistants as are necessary properly to maintain and construct the public roads, highways, bridges, and ferries of Russell County, and he shall have authority to prescribe their duties and to discharge said employees for cause, or when not needed; (2) to perform such engineering and surveying service as may be required, and to prepare and maintain the necessary maps and records; (3) to maintain the necessary accounting records to reflect the cost of the

county highway system; (4) to build, or construct new roads, or change old roads, upon the order of the county commission; (5) insofar as is feasible to construct and maintain all country [sic] roads on the basis of the county as a whole or as a unit.

Section 2. The provisions of this act are severable. If any part of this act is declared invalid or unconstitutional, such declaration shall not affect the part which remains.

Section 3. All laws or parts of law which conflict with this act are hereby repealed.

Section 4. This act shall become effective immediately upon its passage and approval by the Governor, or upon its otherwise becoming a law.

Approved July 30, 1979

Time: 6:00 P.M.

Alabama Code, 1975, § 23-1-80 (Michie 1989 Repl. Vol.)

The county commissions of the several counties of this state have general superintendence of the public roads, bridges and ferries within their respective counties so as to render travel over the same as safe and convenient as practicable. To this end, they have legislative and executive powers, except as limited in this chapter. They may establish, promulgate and enforce rules and regulations, make and enter into such contracts as may be necessary or as may be deemed necessary or advisable by such

commissions to build, construct, make, improve and maintain a good system of public roads, bridges and ferries in their respective counties, and regulate the use thereof; but no contract for the construction or repair of any public roads, bridge or bridges shall be made where the payment of the contract price for such work shall extend over a period of more than 20 years. (Code 1923, § 1347; Acts 1927, No. 347, p. 348; Code 1940, T. 23, § 43; Acts 1953, No. 729, p. 984.)

Alabama Code, 1923, § 1347 (Michie).

1347. (5765) Powers of courts of county commissioners with regard to roads, bridges and ferries. – The courts of county commissioners, boards of revenue, or other like governing bodies of the several counties of this state have general superintendence of the public roads, bridges and ferries within their respective counties, and may establish new, and change and discontinue old roads, bridges and ferries in their respective counties so as to render travel over the same as safe and convenient as practicable. To this end they have legislative, judicial, and executive powers, except as limited in this article. Courts of county commissioners, boards of revenue, or courts of like jurisdiction are courts of unlimited jurisdiction and powers as to the construction, maintenance and improvement of the public roads, bridges and ferries in their respective counties, except as their jurisdiction or powers may be limited by the local or special statutes of the state. They may establish, promulgate and enforce

rules and regulations, make and enter into such contracts as may be necessary, or as may be deemed necessary or advisable by such courts, or boards, to build, construct, make, improve and maintain a good system of public roads, bridges and ferries in their respective counties, and regulate the use thereof; but no contract for the construction or repair of any public road, bridge or bridges shall be made where the payment of the contract price for such work shall extend over a period of more than ten years.

Alabama Code, 1940, Title 23 § 43 (Michie).

§ 43. (1347) Powers of courts of county commissioners with regards to roads, bridges and ferries. – The courts of county commissioners, boards of revenue, or other like governing bodies of the several counties of this state have general superintendence of the public roads, bridges and ferries within their respective counties so as to render travel over the same as safe and convenient as practicable. To this end they have legislative, judicial and executive powers, except as limited in this chapter. Courts of county commissioners, boards of revenue, or courts of like jurisdiction are courts of unlimited jurisdiction and powers as to the construction, maintenance and improvement of the public roads, bridges and ferries in their respective counties, except as their jurisdiction or powers may be limited by the local or special statutes of the state. They may establish, promulgate and enforce rules and regulations, make and enter into such contracts

as may be necessary, or as may be deemed necessary or advisably by such courts, or boards, to build, construct, make, improve and maintain a good system of public roads, bridges and ferries in their respective counties, and regulate the use thereof; but no contract for the construction or repair of any public roads, bridge or bridges shall be made where the payment of the contract price for such work shall extend over a period of more than ten years. (1927, p. 348.)

Alabama Code, 1975, § 11-6-3 (Michie 1989 Repl. Vol.)

It shall be the duty of the said county engineer or chief engineer of the division of public roads, subject to the approval and direction of the county commission to:

(1) Employ, supervise and direct such assistants as are necessary to construct and maintain properly the county public roads, highways and bridges;

(2) Perform such engineering and surveying services as may be required to prepare and maintain the necessary maps, plans and records;

(3) Maintain the necessary accounting records to reflect the cost of constructing and maintaining the county highway system; and

(4) Perform such other duties as are necessary and incident to the operation of the county highway system as directed by the county commission. (Acts 1971, No. 1945, p. 3143, § 4.)

Alabama Code, 1940, Title 12 § 69 (Michie)

§ 69. Duties under supervision of county governing body. – It shall be the duty of said county engineer, subject to the approval and direction of the court of county commissioners or like governing body of the county to: (1) Employ, supervise and direct such assistance as are necessary to properly maintain and construct the county public roads, highways and bridges; (2) perform such engineering and surveying service as may be required and to prepare and maintain the necessary maps and records; (3) maintain the necessary accounting records to reflect the cost of the county highway system, and (4) perform all other duties necessary and incident to the operation of a county highway system. (Ib.)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

| | | |
|-----------------------|---|----------------|
| ED PETER MACK, et al. |) | |
| Plaintiffs, |) | CIVIL ACTION |
| |) | NO. 89-T-459-E |
| vs. |) | |
| RUSSELL COUNTY |) | |
| COMMISSION, et al. |) | |
| Defendants. |) | |

STIPULATED TESTIMONY OF LYNDA K. OSWALD

COME NOW parties to the foregoing cause of action and stipulate that if Lynda K. Oswald were present, she would testify as follows:

"I am Lynda K. Oswald, an assistant attorney general with the Office of the Attorney General, State of Alabama, and have been so employed for over ten years.

"As a part of my duties I review all legislative acts to determine which should be submitted for preclearance under Section 5 of the Voting Rights Act of 1965. I reviewed Act No. 79-652 at the time of its passage to determine if it should be submitted for pre-clearance under the Voting Rights Act. It was my determination that the provisions of Act No. 79-652 had no effect on voting or elections in this state. Therefore, I concluded that it was not necessary to submit Act No. 79-652 to the Justice Department for pre-clearance, and it was not submitted.

"Act No. 79-652 concerns Russell County and provides that the functions, duties and

responsibilities for construction, maintenance and repair of public roads and bridges in that county are to be vested in the county engineer and maintained on the basis of the county as a whole without regard to district or beat lines. I have reviewed other acts of similar nature establishing what is known as the unit system, and it has been my opinion, as it is now, that such acts do not come within the ambit of the Voting Rights Act of 1965 so as to require pre-clearance.

"I concluded that Act No. 79-652 had no effect on voting or elections in this state, and I determined that Act No. 79-652 was a modification of duties relating to the maintenance of roads in Russell County and did not affect or dilute the voting power of any group of voters. Act No. 79-652 provided that the functions, duties and responsibilities relating to roads in Russell County were to be vested in the county engineer and maintained on the basis of the county as a whole without regard to district or beat lines. I am aware of the decision in *Hardy v. Wallace*, 603 F.Supp. 174 (N.D. Ala. 1985) and that court ruling does not change my opinion that it is not necessary to obtain preclearance of Act No. 79-652."

As a result of this stipulation, parties hereto consent to this testimony being used in lieu of a deposition.

/s/ John C. Falkenberry
John C. Falkenberry,
one of the Attorneys
for Plaintiffs

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300 North 21st Street
Birmingham, Alabama 35203

/s/ James W. Webb
James W. Webb
Attorney for Defendant
Russell County

OF COUNSEL:

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SASSER, DAVIS & ALLEY
One Commerce Street, Suite 700
P.O. Box 238
Montgomery, AL 36101-0238
(205) 834-3176

A-13

BREAKDOWN OF ROADWAY MILEAGE MAINTAINED OR UNDER JURISDICTION

| <u>DISTRICT NO.</u> | <u>TOTAL MILES</u> | | <u>PAVED ROADS</u> | |
|---------------------|--------------------|---------|--------------------|-------|
| | | | <u>TOTAL MILES</u> | |
| 1 | 6.25 | 1.1% ** | 6.25 | 2% |
| 2 | 51.87 | 9.5% | 42.17 | 15% |
| 3 | 2.45 | .4% ** | 2.45 | .9% |
| 4 | 1.3 | .2% ** | 1.1 | .4% |
| 5 | 73.92 | 13.8% * | 46.02 | 16% |
| 6 | 138.15 | 25.2% | 72.3 | 25.5% |
| 7 | 271.40 | 49.6% | 113.05 | 40% |
| | 545.34 | | 283.34 | |

* 20.12 square miles of District 5 lies within U.S. Government jurisdiction and is included in the above breakdown.

** Maintained by Phenix City Public Works Department.

WORK DISTRICT

| <u>DISTRICT NO.</u> | <u>TOTAL MILES</u> | <u>PAVED ROADS</u> |
|---------------------|--------------------|--------------------|
| | | <u>TOTAL MILES</u> |
| 1 | 179.49 | 126.98 |
| 2 | 213.89 | 92.10 |
| 3 | 151.96 | 64.26 |
| | 545.34 | 283.34 |

N OF RUSSELL COUNTY BY COMMISSION DISTRICTS

| DIRT ROAD | | AREA | |
|--------------------|-------|---------------------|-------|
| <u>TOTAL MILES</u> | | <u>SQUARE MILES</u> | |
| 0 | 0 | 3.8 | .6% |
| 9.7 | 3.7% | 18.4 | 3.0% |
| 0 | 0 | 4.48 | .72% |
| .2 | .08% | 2.32 | .37% |
| 27.9 | 10.7% | 76.08 | 12.3% |
| 65.85 | 25% | 143.36 | 23.2% |
| 158.35 | 60.2 | 370.44 | 59.9% |
| 262.00 | | 618.88 | |

ment property (Ft. Benning). This area is not

CTS

UNPAVED ROADS TOTAL MILES

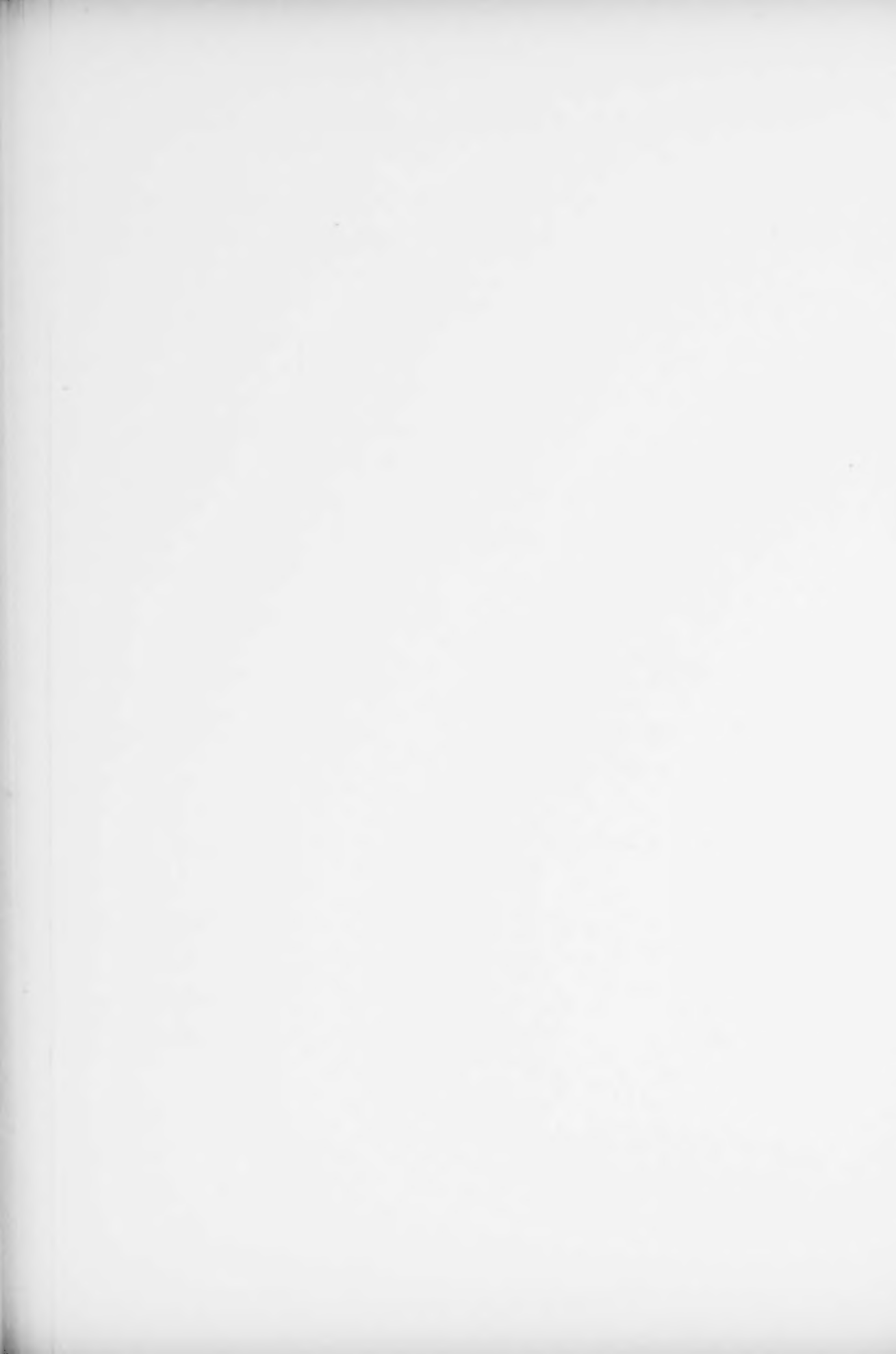
52.51

121.79

87.70

262.00

Exhibit B



IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA,
EASTERN DIVISION

| | | |
|------------------------|---|----------------|
| ED PETER MACK, ET AL., |) | |
| |) | |
| Plaintiffs, |) | CIVIL ACTION |
| |) | NO. 89-T-459-E |
| vs. |) | |
| |) | |
| RUSSELL COUNTY |) | |
| |) | |
| COMMISSION, et al., |) | |
| |) | |
| Defendants. |) | |

DEPOSITION OF JOHN BELK

The deposition of JOHN BELK was taken pursuant to stipulation and agreement before Jackie Parham, court Reporter and Commissioners for the State of Alabama at Large, at the Russell County Courthouse, Phenix City, Alabama, on Friday, January 26, 1990, commencing at approximately 9:00 a.m.

[p. 8] Q. Prior to passage of Act Number 79-652?

A. Yes, sir. we implemented the Unit System at that time. And, of course, Mr. Adams was going to - to get the necessary legislation to make it a law.

Q. Tell me, what brought this about?

A. Well, the main thing that brought it about was one commissioner was indicted and charged with an illegal use of county funds. I would say that's the last thing that brought it on.

Really, generally, the fact that we needed a little bit more control over expenditures and work orders was basically the reason for going - not having three different county shops and three

different county commissioners in charge of three different areas.

Q. All right, sir. Did you ever divide the budget [p. 9] prior to that when you - When you were under the District System did you divide the budget up according to the districts?

A. No, sir.

* * *

[p. 10] Q. . . . is it your testimony and do I understand correctly that prior to May 18, 1979 there was a unified budget for the county with respect to the - to the three separate, what I would call, road camps?

A. Yes, sir. There was never any discretion between the three. It was always adopted as far as a general budget for the county.

Q. How many commissioners were there?

A. Five.

Q. Five at that time?

A. Yes, sir.

Q. Is it true that prior to May 18, 1979 only three of them had responsibilities for overseeing the operation of these road camps?

A. Yes, sir.

* * *

[p. 20] Q. In size were they relatively the same in terms of the physical area and also the number of employees?

A. Yes, sir. In fact, the districts were established according to road miles. So they all had pretty much the same number of miles and the same number of bridges to maintain.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA,
EASTERN DIVISION

| | | |
|------------------------|---|----------------|
| ED PETER MACK, ET AL., |) | |
| Plaintiffs, |) | CIVIL ACTION |
| |) | NO. 89-T-459-E |
| vs. |) | |
| RUSSELL COUNTY |) | |
| COMMISSION, et al., |) | |
| Defendants. |) | |

DEPOSITION OF CHARLES ADAMS

The deposition of CHARLES ADAMS was taken pursuant to stipulation and agreement before Jackie Parham, court Reporter and Commissioners for the State of Alabama at Large, at the Russell County Courthouse, Phenix City, Alabama, on Friday, January 26, 1990, commencing at approximately 9:30 a.m.

[p. 8] Q. In view of the fact that the county had already adopted the resolution prior to -

A. So in discussing it with them - and I believe the suggestion was even made that they would do it by resolution, wouldn't be any further act. But we felt we needed something stronger in place. We needed something in place that would assure that it would be complied with, that -

Q. That the commission wouldn't backtrack?

A. That they wouldn't come back and pass another resolution at the next meeting and say, no, we've changed our mind.

* * *

[p. 13] Q. All right. And was that, as I understand it, due at least in some measure to the problems that commissioner - then Commissioner Lake had had?

A. To some degree. And with recommendations by [p. 14] the Highway Department, you know, and the stories they would relate about the benefits of this system and the experiences in some other counties and that type thing.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA,
EASTERN DIVISION

| | | |
|------------------------|---|----------------|
| ED PETER MACK, ET AL., |) | |
| |) | |
| Plaintiffs, |) | CIVIL ACTION |
| |) | NO. 89-T-459-E |
| vs. |) | |
| |) | |
| RUSSELL COUNTY |) | |
| COMMISSION, et al., |) | |
| |) | |
| Defendants. |) | |

DEPOSITION OF NATHANIEL GOSHA

The deposition of NATHANIEL GOSHA was taken pursuant to stipulation and agreement before Jackie Parham, court Reporter and Commissioners for the State of Alabama at Large, at the Russell County Courthouse, County Commission Hearing Room, Phenix City, Alabama, on Thursday, January 29, 1989, commencing at approximately 9:00 a.m.

[p. 17] Q. Did you vote for the budget:

A. Yes, sir.

* * *

[p. 36] A. . . . Let's back up one notch. Talking about the system, the unit system, if we're going to run a unit system, I prefer and the black citizens of Russell County prefer, let's give it all to Mr. James McGill and let Mr. James McGill administrate it.

* * *

[p. 82] A. From this thing here, I would like for the Court to look into and if they find any irregularity in it, where the city district could have some type of funds that they could help the citizens of this county, that I will certainly appreciate it. That we have some type of way that they will allocate a said amount of money if it's nothing but forty thousand dollars where a man can spend forty thousand dollars in his district without [p. 83] getting the majority of the votes.

* * *

IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF ALABAMA,
EASTERN DIVISION

| | | |
|------------------------|---|------------------|
| ED PETER MACK, ET AL., |) | |
| Plaintiffs, |) | CIVIL ACTION NO. |
| |) | 89-T-459-E |
| vs. |) | |
| RUSSELL COUNTY |) | |
| COMMISSION, et al., |) | |
| |) | |
| Defendants. |) | |

DEPOSITION OF ED P. MACK

The deposition of ED P. MACK was taken pursuant to stipulation and agreement before Jackie Parham, Court Reporter and Commissioners for the State of Alabama at Large, at the Russell County Courthouse, County Commission Hearing Room, Phenix City, Alabama, on Thursday, January 29, 1989, commencing at approximately 10:45 A.M.

[p. 17] Q. Now, you voted for the budget, too, and you had a copy of the budget at the time, did you not?

A. Right.

Q. You did vote in favor, did you not?

A. Right.

IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF ALABAMA,
EASTERN DIVISION

| | | |
|------------------------|---|------------------|
| ED PETER MACK, ET AL., |) | |
| Plaintiffs, |) | CIVIL ACTION NO. |
| |) | 89-T-459-E |
| vs. |) | |
| RUSSELL COUNTY |) | |
| COMMISSION, et al., |) | |
| Defendants. |) | |

DEPOSITION OF JEROME GRAY

The deposition of JEROME GRAY was taken pursuant to stipulation and agreement before Jackie Parham, Court Reporter and Commissioners for the State of Alabama at Large, at the law offices of Webb, Crumpton, McGregor, Sasser, Davis & Alley, Montgomery, Alabama, on Tuesday, December 12, 1989, commencing at approximately 10:35 a.m.

[p. 21] Q. What type of relief did Mr. Mack want?

A. In Mr. Mack's case it appears that he wants some discretionary money or some money from - being able to really - well, some money. Have a budget whereby he would be able to determine how some dollars are spent without everything being thrown in a common pot that he had - seemingly had no influence over how it was spent, particularly with other commissioners. The majority of whites could out-vote him.

Q. Have you ever heard that Mr. Mack had financial problems?

A. No, I have not. I don't see how it would be germane to this issue anyway even if he did.

Q. Okay. And what was Mr. Gosha's complaint?

A. Similar to Mr. Mack's.

Q. He wanted some discretionary money himself?

A. Right. Be able to influence how some dollars are spent, have some direct control over it themselves.

In The
Supreme Court of the United States
October Term, 1991

LAWRENCE C. PRESLEY, individually and on behalf
of others similarly situated,

Appellant,

vs.

ETOWAH COUNTY COMMISSION,

Appellee.

ED PETER MACK and NATHANIEL GOSHA, III,
individually and on behalf
of others similarly situated,

Appellants,

vs.

RUSSELL COUNTY COMMISSION,

Appellee.

On Appeal From The United States District Court
For The Middle District Of Alabama

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October 1991



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statutes and regulations:

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| Voting Rights Act of 1965, Section 2, 42 USC § 1973 | 9, 18 |
| Voting Rights Act of 1965, Section 5, 42 USC § 1973c | <i>passim</i> |

Statutory history materials:

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| H.R. Rep. No. 91-397, 91st Cong., 2d Sess. (1970), <i>reprinted in</i> 1970 Cong. Code & Ad. News. 3283 | 5, 6, 17 |
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H.R. Rep. No. 97-227, 97th Cong., 1st Sess. 14 (1982) . 6, 7,
10, 16

H.R. Rep. No. 439, 89th Cong., 1st Sess. (1965), *reprinted in*
1965 US Code, Cong. & Ad. News 2437 5

S. Rep. No. 94-295, 94th Cong., 1st Sess. 16 (1975) 6, 7

S. Rep. No. 97-417, 97th Cong., 2d Sess. 6 (1982) . . 6, 7, 15,
17

S. Rep. No. 162, 89th Cong., 1st Sess., *reprinted in* 1965 US
Code, Cong. & Ad. News 2508, 2550 5

misc:

US Commission on Civil Rights, *The Voting Rights Act: Ten Years*
After (1975) 4, 7

Argument in Reply

Put simply, appellees' briefs read as if they were written in an historical vacuum. They completely ignore Congress' purpose in enacting, and thrice extending, § 5: to assure that the voting rights of black citizens in jurisdictions such as Russell and Etowah Counties are not effectively nullified by the substitution of subtle and ingenious tactics for outright disenfranchisement. Instead, appellees advance a narrow, formalistic notion of the right to vote that has been repeatedly rejected by Congress, the Attorney General, and this Court. They suggest that as long as a jurisdiction disguises changes in its voting standards, practices, and procedures by calling them something innocuous—like a “common fund resolution” (Etowah County) or a “ministerial” reallocation of authority (Russell County)—it can ignore with impunity Congress' carefully considered judgment that preclearance of all such changes is critical to the protection of minority voting rights. Congress did not enact the Voting Rights Act as just another weapon for attacking discrete acts of state officials designed to discriminate against black people. Rather, the purpose of the Voting Rights Act is to ensure that the institutional structures and rules by which such discrete decisions are made provide blacks full and equal participation in the political process.

Appellants' reply brief proceeds in four parts. First, we review the background, ignored by the appellees, against which § 5 was enacted in 1965, and was extended in 1970, 1975, and 1982, to show that § 5's central purpose was to protect black voters from the erection of new barriers to full participation in the political process. Second, we restate the standard to be applied by courts faced with claims of § 5's *coverage* (that is, local three-judge courts, and this Court, when it reviews their decisions): if, the nature of the challenged change is such that, under *any* set of facts, the Attorney General or the United States District Court for the District of Columbia *could* conclude that the challenged

change¹ has either the purpose or the effect of denying the right to vote, a jurisdiction must seek preclearance. The final two sections show how the Etowah and Russell County enactments fall within the scope of § 5.

I. Section 5 was adopted in reaction to covered jurisdictions' long history of cunning stratagems for denying effective voting rights to their black citizens.

Congress' decision to enact § 5's "stringent" and "extraordinary" preclearance process, *McCain v Lybrand*, 465 US 236, 244 (1985), was the product of its experience with the intransigent refusal of Southern jurisdictions, including Alabama, to comply with constitutional, statutory, and judicial commands guaranteeing black citizens the right to vote.

A. A brief history of disenfranchisement efforts in Alabama.

The Fifteenth Amendment and the Alabama Constitution of 1867 gave black citizens the formal right to vote for the first time in Alabama history. *See United States v Alabama*, 252 FSupp 95, 97 (MD Ala 1966) (3-judge court). But following the end of Reconstruction, white supremacists regained control of the state government and sought, in a variety of both subtle and direct ways, to eliminate black political power. The state legislature passed a series of local laws giving the governor the power to appoint county commissions in "counties threatened with black voting majorities." *Dillard v Crenshaw County*, 640 FSupp 1347,

1. In this case, it is essentially undisputed that both the Etowah Common Fund Resolution and Act 79-652's transfer of roadwork authority from the Russell County Commission were "changes" from pre-existing procedures. Appellees argue only that they were not changes "with respect to voting."

1358 (MD Ala 1986).² In 1893, the legislature passed the so-called "Sayre Law," which enacted a complex set of registration requirements, deprived illiterate voters of real assistance in casting their ballots, and effectively eliminated Republicans and Populists from local registration and election boards. The Sayre Law caused a tremendous drop in black political participation. *Brown v Board of School Commissioners*, 542 FSupp 1078, 1091 (SD Ala 1982). In 1894, a number of counties moved from district-based to at-large elections to dilute the voting strength of those blacks who still voted. *Dillard*, 640 FSupp at 1358.

At its 1901 Constitutional Convention, Alabama adopted a new constitution one of whose "major purpose[s] ... was to disenfranchise black persons." *Id.*; see also *Hunter v Underwood*, 471 US 222, 229 (1985) (purpose of the 1901 Alabama Constitutional Convention was "to establish white supremacy in this State," according to the president of the Convention); *United States v Alabama*, 252 FSupp at 98-99 (delegates to the 1901 convention "were anxious to provide devices that would avoid a legal attack based on the Fourteenth and Fifteenth Amendments but still successfully subvert the purpose of those amendments"). Because of the adoption of a series of techniques--among them a poll tax;³ a grandfather clause; and good character, education, residence, employment, and property qualifications, see *id.* at 99--by 1909, "all but approximately 4,000 of the nearly 182,000 black persons of voting age had been removed from the rolls of eligible voters." *Dillard*, 640 FSupp at 1358; see also *United States v Alabama*, 252 FSupp at 99 (100,000 black Alabamians had voted in 1900, but by 1908, only 3742 were even registered).

In addition, during the first two-thirds of this century, Alabama was essentially a one-party state. Until 1946, the Alabama Democratic Party maintained a white primary. *Brown*,

2. Appellee Etowah County Commission was one of the named defendants in *Dillard v Crenshaw County*.

3. In *United States v Alabama*, the three-judge district court held that the poll tax violated the Fifteenth Amendment.

542 FSupp at 1092. Since the Democratic nomination was tantamount to election, there was little reason for even those blacks who could register and vote to participate, since their votes in the general election were essentially meaningless. When, however, this Court outlawed white primaries in *Smith v Allwright*, 321 US 649 (1944), the specter of genuine black participation in the electoral process prompted Alabama to adopt the "Boswell Amendment," which granted local boards of registrars sweeping discretion designed to "enable them to prevent from registering those elements in our community [i.e., blacks] which have not yet fitted themselves for self-government." *Brown*, 542 FSupp at 1092 (internal quotation marks omitted). Ultimately, a three-judge court struck down the Boswell Amendment as a purposeful attempt to prevent blacks from voting. *Davis v Schnell*, 81 FSupp 872, 879-81 (SD Ala 1949) (3-judge court), *aff'd*, 336 US 933 (1950).

Despite the plethora of formal and informal barriers placed in their way, increasing numbers of black citizens began to seek to register and to vote during the 1950's. The state legislature and local officials responded to this trend by devising new mechanisms for minimizing black political power. Perhaps the most notorious was the Tuskegee gerrymander, see *Gomillion v Lightfoot*, 364 US 339 (1960), which redrew the city limits to exclude all but a handful of Tuskegee's black residents. Blacks could continue to vote in other elections, but they were no longer in a position to elect city officials. In addition, the legislature employed such tactics as outlawing single-shot voting,⁴ enacting numbered-place requirements, and replacing district-based elections with at-large elections, for the purpose of further diluting black voting strength. *Dillard*, 640 FSupp at 1356, 1357, 1359. Even if blacks were able to register and to vote, these devices would prevent them from "electing one of their own race," *id.* at 1357 (quoting a state senator's explanation of the purpose of banning single-shot voting).

4. For an explanation of why bans on single-shot voting can impair black voting strength, see, e.g., *City of Rome v United States*, 446 US 156, 184 (1980); US Commission on Civil Rights, *The Voting Rights Act: Ten Years After* 206-07 (1975).

Put simply, as soon as one avenue for excluding blacks from the political process was cut off, state and local officials sought another. As one district court--upon whose observation Congress explicitly relied in explaining the need for § 5, *see* S. Rep. No. 162, 89th Cong., 1st Sess., *reprinted in* 1965 US Code, Cong. & Ad. News 2508, 2550 (joint views of 12 members of the Judiciary Committee) [hereafter "1965 Senate Report"]--noted:

[I]n spite of [repeated] judicial declarations [forbidding various discriminatory schemes], the evidence in this case makes it clear that the defendant State of Alabama ... continues in the belief that some contrivance may be successfully adopted and practiced for the purpose of thwarting equality in the enjoyment of the right to vote by citizens of the United States

United States v Penton, 212 FSupp 193, 201-02 (MD Ala 1962) (3-judge court) (internal quotation marks omitted).

B. *Congress' commitment to preventing further "contrivances" for diluting the black vote.*

Among other things, the Voting Rights Act of 1965 suspended the use of various tests and devices that had been used to prevent blacks from registering and voting in jurisdictions such as Alabama. But experience under legislation passed in 1957, 1960, and 1964 had shown "the ingenuity and dedication of those determined to circumvent the guarantees of the 15th amendment," H.R. Rep. No. 439, 89th Cong., 1st Sess. (1965), *reprinted in* 1965 US Code, Cong. & Ad. News 2437, 2441. "Barring one contrivance too often has caused no change in result, only in methods." *Id.*; *see also* 1965 Senate Report at 2543.

It was "[i]n order to preclude such future State or local circumvention of the remedies and policies of the 1965 act" that Congress passed § 5. H.R. Rep. No. 91-397, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 Cong. Code & Ad. News 3283 [hereafter "1970 House Report"]; *see also South Carolina v Katzenbach*, 383 US 301, 335 (1965) (noting that covered states

"had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating black political powerlessness in the face of adverse federal court decrees. Congress had reason to suppose that these States might try similar maneuvers in the future in order to evade the remedies contained in the Act itself").

Each time that Congress has revisited § 5, and renewed and strengthened its commitment to § 5's preclearance scheme, it has also reiterated its concern that, "with discrimination in registration and at the voting booth blocked," states and counties will develop other sorts of legislation to "undo or defeat the rights recently won by nonwhite voters." 1970 House Report at 3284; *see also, e.g.*, S. Rep. No. 94-295, 94th Cong., 1st Sess. 16 (1975)⁵ [hereafter "1975 Senate Report"]; H.R. Rep. No. 97-227, 97th Cong., 1st Sess. 14 (1982)⁶ [hereafter "1982 House Report"]; S. Rep. No. 97-417, 97th Cong., 2d Sess. 6 (1982)⁷ [hereafter "1982 Senate Report"]. Of particular salience to this case, Congress has pointed to changes which it defines as involving "*rules or practices affecting voting*" such as "abolishing or making appointive offices sought by Negro candidates" and "extending the term of office of incumbent white officials," 1970 House Report at 3283, as examples of the kind of structural device § 5 is intended to prevent. Congress has repeatedly recognized that such manipulation of the conditions of office-holding can profoundly affect the value of the votes that blacks are now able to cast. *See, e.g.*,

5. "As registration and voting of minority citizens increases, other measures must be resorted to which would dilute increasing minority voting strength."

6. "The Committee has observed ... continued manipulation of registration procedures and the electoral process which effectively exclude minority participation from all stages of the political process."

7. "Following the dramatic rise in registration, a broad array of dilution schemes were employed to cancel the impact of the new black vote The ingenuity of such schemes seems endless. Their common purpose and effect has been to offset the gains made at the ballot box under the Act."

1975 Senate Report at 17; 1982 House Report at 18; 1982 Senate Report at 7; *see also, e.g.*, US Commission on Civil Rights, *The Voting Rights Act: Ten Years After 168-69* (1975) (describing injunction issued in *Jackson v Town of Lake Providence*, Civil No. 74-599 (WD La July 11, 1974)), to prevent the departing white city council members from transferring control of the municipal power plant [Lake Providence's sole source of revenue] to an all-white commission before the black mayor and new, majority-black city council took office); *Sellers v Trussell*, 253 FSupp 915, 917 (MD Ala 1966) (3-judge court) (holding that an extension of incumbents' terms violated the Fifteenth Amendment because it was designed to "freeze Negroes out").

Precisely because of this history, Congress has squarely rejected the idea that there can be any *per se* or *de minimis* exemptions from § 5's coverage: "The discriminatory potential in seemingly innocent or insignificant changes can only be determined after the specific facts of the change are analyzed in context." 1982 House Report at 34-35; *see also* 1982 Senate Report at 7 (§ 5 "require[s] review of *any* new laws in covered areas that could directly or indirectly impair the right to vote") (emphasis added); *Allen v State Board of Elections*, 393 US 544, 566 (1969) ("Congress intended to reach any State enactment which altered the election law of a covered State in even a minor way."); *id.* at 568 (quoting Attorney General Katzenbach at the 1965 House hearings as rejecting the idea of any categorical exclusions "because there are an awful lot of things that could be started for purposes of evading the 15th amendment if there is the desire to do so"). Thus, "far from exempting alterations that might be perceived as minor, Congress failed to adopt such a suggestion when it was proposed in debates on the original Act." *NAACP v Hampton County*, 470 US 166, 176 (1985). *See* Brief for the United States at 21-22.

The legislative history thus points unambiguously in one direction: § 5 was intended to assure that states and localities could not "continue their historical practice of excluding Negroes from the Southern political process," 1982 Senate Report at 7 (quoting 1965 Senate Report), by substituting more sophisticated exclusion-

ary and dilutive techniques for outright disenfranchisement. Congress recognized that the Attorney General and the District Court for the District of Columbia would be called upon to assess the purpose and effects of "complex and subtle" practices. *Id.* at 12. But it firmly concluded that without such review, black Americans would continue effectively to be denied the right to vote.

II. Courts deciding § 5 coverage issues should apply the "potential for discrimination" test.

The standard to be applied in deciding whether a particular enactment requires § 5 preclearance is a direct outgrowth of the congressional concerns outlined in the preceding section.

As the United States and appellants have already noted, Appellants' Brief at 19-21, Brief for the United States at 11, 22-23, a § 5 coverage court may decide only whether preclearance is required, and *not* whether the challenged enactment actually has the purpose or effect of discriminating. *See, e.g., Dougherty County Board of Education v White*, 439 US 32, 42 (1978); *Georgia v United States*, 411 US 526, 534 (1973); *Perkins v Matthews*, 400 US 379, 383-85 (1971). This decision is analogous to the question before a court faced with a motion to dismiss a complaint under Fed R Civ P 12(b)(6). The question a coverage court should ask is whether it can imagine a set of facts which might lead the Attorney General or District Court for the District of Columbia to conclude that the change was adopted for the purpose or will have the effect of denying or abridging the right of black citizens to vote. *Cf. Conley v Gibson*, 355 US 41, 45-46 (1957) ("a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief"). If the coverage court can envision such a set of facts, its job is at an end: it must enjoin the challenged change until the jurisdiction seeking to implement the change has successfully completed the preclearance process.

The court below expressly acknowledged that it did not intend to foreclose appellants' constitutional claims under the Fourteenth and Fifteenth Amendments or their substantive claims under § 2 of the Voting Rights Act. *See* JS A-18 n. 17; JS A-20 n. 18; JS A-21 n. 21. But to say those claims are not foreclosed--and neither appellee really argues to the contrary, *see* Etowah Brief at 23 n. 30--requires acknowledging that a trial on the merits might show that the Common Fund Resolution and Act 79-652 had been adopted for the purpose of depriving appellants of their right to vote on account of their race (thereby violating the Fourteenth and Fifteenth Amendments, as well as § 2), or that these provisions result in such a denial, regardless of the purpose underlying their enactment (thus violating § 2). Given the "close connection between § 2 and § 5," *Chisom v Roemer*, 111 SCt 2354, 2367 (1991), it would be "anomalous" to conclude that an existing practice could be challenged under § 2, but that its adoption by a covered jurisdiction is not subject to § 5 preclearance.

The fact that a particular change may have been undertaken for entirely legitimate and non-voting-related reasons, or that whatever the reason for its adoption it has no effect on the voting power of the minority community, goes to the *merits* of § 5 review, and not to whether preclearance must be sought in the first place. The decision about the actual purpose or effect is for the Attorney General or the District Court for the District of Columbia to make, not for local three-judge courts to decide. *See* Appellants' Brief at 23-29. The Brief for the United States makes clear that the Attorney General is ready, willing, and able to handle such submissions and has a better idea of how to make the substantive distinctions necessary for this type of submission. Brief for the United States at 17-23.

III. In light of § 5's purpose and history, Russell County was required to seek preclearance for Act 79-652.

Essentially, Russell County makes three arguments as to why the transfer of authority over roadwork from the elected County

Commission to the appointed County Engineer should be exempt from § 5. All are, within the context of a § 5 coverage proceeding, meritless. Moreover, the potentially discriminatory impact on appellants' right to vote is clear.

A. *Russell County's legal arguments fundamentally misconstrue the scope and operation of § 5.*

First, appellee raises arguments that are more properly addressed either to the Attorney General or to the District of Columbia District Court. Thus, for example, its claim that blacks are actually better off under the unit system, Russell Brief at 28-30, is simply beside the point. It goes to whether the change in fact had a discriminatory purpose or effect.⁸ See *Georgia v United States*, 411 US at 534.

Second, appellee advances a conception of § 5--that it is primarily (if not solely) concerned with black registration, Russell Brief at 23-28, and was never intended to reach "minor" or "ministerial" enactments, Russell Brief at 9, 17, 21-22, not expressly connected with going into a voting booth and pulling a lever--that flies in the face of every pronouncement Congress and this Court have made regarding § 5's scope. See, e.g., 1982 House Report at 17 ("The Congress and the courts have long recognized that protection of the franchise extends beyond mere prohibition of official actions designed to keep voters away from the polls, it also includes prohibition of state actions which so manipulate the elections process as to render voters [*sic*] meaningless."). Appellee mentions, and then completely ignores, this

8. Appellee's condescending suggestion that "[g]overnmental integrity benefits black constituents as well as white," Russell Brief at 29, but that somehow black elected officials and the voters they represent are too misguided to understand this, as well as their attempt to insinuate that Commissioner Mack is somehow trying to use governmental funds for private purposes, see *id.* at 29 n. 38 and A-20 to 21, bespeak precisely the kind of exclusionary motives that a full-scale § 5 review might flush out. See *infra* at Part III.B.

Court's emphatic rejection, in *Hampton County*, of the contention that "ministerial" acts do not require preclearance. See Russell Brief at 21-22. Congress has repeatedly ratified this Court's statement that § 5 "reach[es] any State enactment which alter[s] the election law of a covered State in even a minor way." *Allen v State Board of Elections*, 393 US 544, 566 (1969). There are simply *no* categorical exemptions from § 5 coverage.

The heart of appellee's argument, however, is its purported identification of a "'change in constituency limitation' in § 5 coverage." Russell Brief at 9. Appellee acknowledges that no decision of this Court has ever expressed such a limitation. Russell Brief at 10. In holding that when "an important county officer in certain counties was made appointive instead of elective [t]he power of a citizen's vote is affected," and thus preclearance is required, *Allen*, 393 US at 569-70, this Court did not condition its analysis on whether the constituency that elects the appointing body is the same as the constituency that had previously elected the now-appointed official. Nor, as appellee recognizes, did such cases as *Dougherty County Board of Education v White*, 439 US 32 (1978), or *Hadnott v Amos*, 394 US 358 (1969), depend on any change in constituency. Thus, the fact that *some* changes which require § 5 preclearance do involve changes in constituency--for example, changes from district-based to at-large election--hardly requires that *all* changes have such a character.

The reason an elective-to-appointive case does not require a change in constituency to fall within § 5 is clear from *Allen*: the value of the right to vote has been diminished because "after the change [a voter] is prohibited from electing an officer formerly subject to [his or her] approval." 393 US at 570. Before the change in *Bunton*, black voters in Mississippi could cast votes for two separate officials: a school board member *and* a county superintendent of education. Afterwards, they could vote for only one. That is clearly a change affecting voting.

Russell County claims that because it did not formally abolish the office of county commissioner, but simply transferred its central powers to an appointed official (the county engineer), it can

somehow evade the reach of § 5. That sort of formalistic casuistry is precisely what § 5, which “is not concerned with a simple inventory of voting procedures, but rather with the reality of changed practices as they affect Negro voters,” *Georgia v United States*, 411 US at 531, condemns. Turning the officials actually elected by black voters into mere figureheads clearly denies blacks the right to cast meaningful ballots.

B. *The clear potential for black vote dilution in Act 79-652 requires submission.*

Taken in context, the potential for Act 79-652 to deny or dilute the voting strength of Russell County’s black voters is palpable, and convincingly shows why preclearance should have been required. As we have already seen, state and local authorities across Alabama have frequently reacted to the potential for increased black political participation by changing the rules of the game to assure that even if blacks obtain the vote, or start to elect candidates of their choice, total control will remain in white hands. *See supra* Part I.A. Appellee’s claim that Act 79-652 could not have been intended to forestall black control over a portion of the county’s roadwork because it was enacted “seven years before appellants Mack and Gosha or any other black was elected to the Russell County Commission,” Russell Brief at 13 n. 11 (emphasis in original), rings hollow in light of the fact that in the 1940’s and 1950’s, Alabama manipulated its electoral system to ensure that blacks, who were not effectively enfranchised until 1965, would remain excluded from effective power. Moreover, as we pointed out in our opening brief, it was entirely foreseeable in 1979, that blacks *would* soon force Russell County to adopt district elections for the county commission, *see* Brief of Appellants at 34, and given that most of the county’s roads are in fact in predominantly black districts, *see* Russell Brief at 30 and A-13, this might have resulted in black voters and the officials they elected controlling a substantial percentage of this critical governmental function.

It is entirely possible, then, that a full-scale review of the

reasons why the county commission pressed for Act 79-652 will show that it was at least in part a pre-emptive strike against black voters' future ability actually to elect county commissioners representing their distinctive interests and the concomitant loss of complete white control over roadwork operations. Given the consistency of such an outcome with Alabama's history, this Court's inquiry is at an end: the county must submit the act for preclearance.

Subsequent events in Russell County illustrate how the potential for discrimination inherent in Act 79-652 became a reality.⁹ Had Russell County's commissioners still been "acting autonomously under the district system" in 1986, J.S. A-16; *see also* J.S. A-2 to A-3 (describing the pre-existing system),¹⁰ when black voters first attained the ability to elect commissioners of their choice, then black voters would have had effective control over the officials who supervised roadwork in their districts. Now, of

9. The final footnote in the brief filed on behalf of the United States misunderstands our argument. Appellants do *not* claim that "a change not subject to preclearance at the time it is implemented" can somehow "thereafter become subject to preclearance because of subsequent, unanticipated changes." Brief for the United States at 26 n. 10. We contend that at the time Act 79-652 was enacted it was subject to preclearance under § 5 as it had been interpreted since *Bunton v Patterson*. Our only point with regard to subsequent, (perhaps) unanticipated changes is that they may sometimes make manifest the discriminatory potential that always existed. Given that, in light of the current election system for the Russell County Commission, the Attorney General might well conclude that the removal of their authority in fact has and *will have* the effect of diluting black voting strength, *cf. City of Rome v United States*, 446 US 156, 186 (1980), it seems clear that there was always the *potential* for such an effect, and thus preclearance was required. (It might, of course, have been the case that in 1979 the Attorney General or the District Court for the District of Columbia would not have foreseen this effect, and would therefore have precleared Act 79-652, but appellants acknowledge that such an error was for those bodies to make.)

10. Appellee's contrary account of the pre-existing system, *see* Russell Brief at 17-20, is beside the point, as they do not claim, let alone show, that the court below was clearly erroneous in its characterization of the system.

course, such authority is lodged in a majority white body--the county commission--chosen by a county-wide, majority white constituency instead.

IV. Etowah's Common Fund Resolution similarly requires submission for preclearance.

Appellee Etowah County contends that the Road Supervision Resolution and the Common Fund Resolution that it passed in the summer of 1987 responded to "two realities": the disparity in road mileage per district and the fact that after the entry of the consent decree in *Dillard v Crenshaw County*, No. 85-T-1332-N (MD Ala Nov 12, 1986), the number of commissioners exceeded the number of road shops. Etowah Brief at 2-3. That account ignores the most significant "reality" to which Etowah County was required to respond: for the first time in its modern history, elections for the Etowah County Commission were structured in a fashion that gave the county's black voters a realistic opportunity to elect a commissioner of their choice. Moreover, appellee's argument asks this Court, for this first time in its § 5 jurisprudence, to adopt a categorical exemption from § 5 coverage.

- A. *A full-fledged analysis of the Common Fund Resolution might conclude that it has the purpose or effect of diluting the worth of appellants' votes and therefore submission for preclearance is required.*

Etowah County changed the method of electing the county commission only after a district court had concluded that the pre-existing system had been adopted and refined "with the specific intent of discriminating against black persons," *Dillard*, 640 FSupp at 1360. As this Court noted in *Dougherty County Board of Education*, when it required the preclearance of what was purportedly only an internal school board personnel rule, "the circumstances surrounding [such a rule's] adoption and its effect on the

political process are sufficiently suggestive of the potential for discrimination to demonstrate the need for preclearance." 439 US at 42. There, the so-called "personnel" rule was adopted less than a month after the first black candidate for the state legislature announced his candidacy. Here, a so-called "reallocation of official authority," Etowah Brief at 7, occurred immediately upon the heels of the election of the first black commissioner in modern times. This Court can easily hold, in the context of this case, that the Common Fund Resolution might have been adopted with the purpose, or might have the effect, to "wip[e] out overnight" the "advances" Etowah County's black citizens had achieved through the *Dillard* litigation, 1982 Senate Report at 10.

The "blatant and obvious" potential for discrimination that the court below identified with regard to the Road Supervision Resolution, J.S. A-20, is only marginally better hidden with respect to the Common Fund Resolution. If the Etowah County Commission had passed a resolution stating:

- commissioners elected only by white voters must have complete control over the allocation of the county's road budget;
- a commissioner elected by black voters is not permitted to hire road workers; and
- only commissioners elected through processes intended to preserve white supremacy may have access to leftover county road funds

everyone would understand that such a resolution had been passed with the purpose, and would likely have the effect, of rendering black votes largely an academic exercise. Such a hypothetical resolution, explicitly couched in terms of "voters" and "elections," would, we contend, undeniably be subject to § 5 review.

The only difference between that hypothetical resolution and

the Common Fund Resolution actually passed by the Etowah County Commission is that the former is simple-minded while the latter is sophisticated. But the Voting Rights Act, like the Fifteenth Amendment "nullifies sophisticated as well as simple-minded modes of discrimination." *Gomillion v Lightfoot*, 364 US 339, 342 (1960) (quoting *Lane v Wilson*, 307 US 268, 275 (1939)). The first paragraph of the Common Fund Resolution could reasonably be described, given the timing of its passage, as an attempt to ensure that the majority-white electorate retain its stranglehold on all budgetary decisions, because it ensures that commissioners responsible only to it collectively be given the authority that once was exercised by individual commissioners. Thus, it ensures that even if black voters can elect a commissioner, that commissioner will have no authority that cannot readily be controlled by the white majority.

The second paragraph of the Common Fund Resolution could be described, particularly given the simultaneously adopted Road Supervision Resolution, as a measure depriving black voters of any say in the election of the commissioners who actually hire and engage in day-to-day supervision of the road workers.¹¹ Cf. 1982 House Report at 14 (among the "observable consequence of exclusion" from the electoral process are "(1) fewer services from government agencies, (2) failure to secure a share of local government employment, [and] (3) disproportionate allocation of funds, location and type of capital projects").

Finally, the third paragraph of the Common Fund Resolution could be viewed as a *de facto* extension of the terms of office of white commissioners elected under the old, racially exclusionary system. Congress has explicitly described "extending the term of office of incumbent white officials" as a "chang[e] in rules or

11. That the Road Supervision Resolution was subsequently enjoined for failure to seek § 5 preclearance does not change the fact that an objective observer, faced with the resolutions passed in tandem, might well conclude that their intended synergistic effect would be to assure that black voters had no say as to issues where one might otherwise foresee their participation, particularly given the fact that one of the four road shops was in fact in the black district.

practices affecting voting," 1970 House Report at 3283; *see also Sellers v Trussell*, 253 FSupp 915 (MD Ala 1966) (3-judge court) (Judge Rives) (same).

In short, Etowah is disingenuously modest when it says that the Common Fund Resolution "merely transferred [responsibilities] among existing office holders." Etowah Brief at 15 n. 21. In a profound sense, Commissioner Presley was *not* an existing office holder. He was, in fact, something wholly unprecedented in modern Etowah history--a person elected *by the black community* to serve on the Etowah County Commission. The Common Fund Resolution was not a "mere transfer" of responsibilities; it looks suspiciously like a complete seizure of authority.

None of this is to say that Etowah County could not convince either the Attorney General or the District of Columbia District Court that the Common Fund Resolution was adopted for entirely legitimate reasons and has no discriminatory effect on the ability of the county's black citizens to participate equally in the political process. Perhaps it can. (We doubt it.) But the preceding account shows that it is entirely possible that those two bodies will conclude that the Common Fund Resolution is simply "the latest in a direct line of repeated efforts to perpetuate the results of past voting discrimination and to undermine gains won under other sections of the Voting Rights Act." 1982 Senate Report at 12. Given that possible conclusion, submission for preclearance is required.

B. *Appellee's claim that submission for preclearance of changes such as the Common Fund Resolution is "unnecessary" misconstrues the purpose of § 5.*

Appellee claims that Congress' awareness that discrimination by state and local governments might be "redressed through conventional lawsuits" militates in favor of a narrow reading of § 5. Etowah Brief at 23. But it is precisely because "conventional" lawsuits were inadequate to protect minority voters' rights against new discriminatory stratagems that § 5 was enacted. *See supra*

I.B. From the very outset, this Court has understood that § 5's central goal was "to shift the advantage of time and inertia from the perpetrators of the evil to its victims." *South Carolina v Katzenbach*, 383 US 301, 328 (1966).

Contrary to appellee's assertion, the possibility that plaintiffs might eventually prevail on either a Fifteenth Amendment or a § 2 intent or results challenge to the Common Fund Resolution, *see* J.S. A-18 n. 17, A-20 n. 18, A-21 n. 21—a possibility which appellee relegates to a somewhat opaque footnote, Etowah Brief at 23 n. 30—argues *in favor of*, rather than against, finding § 5 coverage. Section 5 was enacted precisely to lift the burden of bringing such challenges from individuals such as the appellants in this case by assuring such changes could not be implemented unless an expert federal forum had satisfied itself that they had neither the purpose nor the effect of denying the right to vote.

And appellees' warning that § 5's effect standard would sweep broadly over many reallocations of authority that surely will be innocent of racial discrimination, Etowah Brief at 19, is, again, precisely what Congress intended. The Voting Rights Act seeks to safeguard rules and procedures that assure black citizens fair and full participation in all governmental decisions, even those that do not have a clear racial component. The right to cast an effective vote entails the power of blacks, at last, to have their say about what constitutes good government, a debate that until now has been the exclusive preserve of whites in Alabama.

C. *Appellee's workability argument is simply an attempt to smuggle a per se exemption into § 5.*

Appellee claims that "it is impossible to overstate the magnitude of the expansion of the statutory mandate proposed here." Etowah Brief at 19. Leaving aside the erroneous assertion that appellant's claim requires an "expansion" of § 5—an assertion we have rebutted above—appellee is flatly wrong in contending that requiring preclearance of changes such as the Common Fund Resolution would swamp the preclearance system. Regardless of

the level of deference due to the Attorney General's interpretation of the scope of § 5--and our opening brief and the Brief for the United States explain why the court below should have deferred to his conclusion that preclearance was required, *see, e.g.*, Brief of the Appellants at 37-38; Brief for the United States at 16--his determination that the Department of Justice has adequate resources to conduct a preclearance process that includes submissions of changes such as the Common Fund Resolution can hardly be gainsaid by outsiders. Moreover, any overburdening would not redound to the disadvantage of the submitting jurisdiction, since unless the Attorney General lodges an objection within the statutory period, the jurisdiction would be free to implement its change.

Notably, while appellee contends that there might be problems with assessing the "effects" of some complex proposed changes, *see* Etowah Brief at 20-22, it ignores completely the fact that the Attorney General and the District Court for the District of Columbia have developed substantial expertise both at analyzing those potential "effects" and at flushing out the hidden *purposes* behind proposed changes.

At bottom, appellee's argument reflects precisely the cast of mind that prompted Congress to enact and extend § 5. Requiring preclearance here, it tells us, "would be pointless, since the legislature could always achieve the same result by another means that did not formally reallocate authority" Etowah Brief at 26. Put somewhat more baldly, what appellee is telling this Court is that it is clever enough to figure out some way of evading Congress' commitment to fully enfranchising its black citizens.

This assurance that there is *some* vehicle for perpetuating the effective exclusion of Etowah's black citizens from the governing process is the central reason why Congress and this Court have consistently refused to adopt categorical exemptions to the preclearance requirement: if such exemptions were created, jurisdictions would simply "cloak" their "impairment of voting rights ... in the garb of the" exempted category. *Gomillion*, 364 US at 345. Thus, even such a seemingly non-voting related change as "cutting the executive's budget," Etowah Brief at 26,

could, under some circumstances, require preclearance. For example, if the Etowah County Commission had passed a resolution saying "the salary for each county commissioner shall be \$25,000, except that the commissioner from District 5 shall receive a salary of only \$1," such a change would require preclearance under the rationale of *Dougherty County*, because it has the obvious potential to deter candidates responsive to the majority-black community in District 5 from running. Cf. *Huffman v Bullock County*, 528 FSupp 703 (MD Ala 1981) (§ 5 preclearance is required for a change in office administration policy that requires an elected official to pay the salaries of his support staff because it might discourage blacks from seeking the elective office).

In this case, the possibility that the Common Fund Resolution is simply another chapter in Etowah County's sorry history of depriving its black citizens of their right to vote "and the consequent advantages that the ballot affords," *Gomillion*, 364 US at 346, is simply too obvious to be ignored. The Common Fund Resolution, like the Road Supervision Resolution, must be submitted for preclearance.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

LAWRENCE C. PRESLEY, ETC., APPELLANT

v.

ETOWAH COUNTY COMMISSION, ET AL.

ED PETER MACK, ET AL., APPELLANTS

v.

RUSSELL COUNTY COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING APPELLANTS**

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QUESTIONS PRESENTED

The ultimate question presented in both cases is whether a transfer of decisionmaking authority from one elected official or set of officials to another official or set of officials is a "change with respect to voting" covered by Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, regardless of whether the officials serve the same or different voting constituencies and regardless of whether the transferred authority is more or less important than other duties of the office.

1. In No. 90-711, the specific question is whether a county commission's decision to transfer authority to determine road work priorities from individual commissioners elected from single-member districts to the entire commission is a change "with respect to voting" under Section 5.

2. In No. 90-712, the specific question is whether a State's transfer of road work authority from county commissioners elected at large from residency districts to a county engineer appointed by the commission is a change "with respect to voting" under Section 5.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-711

LAWRENCE C. PRESLEY, ETC., APPELLANT

v.

ETOWAH COUNTY COMMISSION, ET AL.

No. 90-712

ED PETER MACK, ET AL., APPELLANTS

v.

RUSSELL COUNTY COMMISSION, ET AL.

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA*

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING APPELLANTS**

INTEREST OF THE UNITED STATES

These consolidated appeals present the question whether a transfer of decisionmaking authority from one elected official or set of officials to another official or set of officials is a change "with respect to voting" subject to preclearance under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. Under Section 5, the Attorney General is responsible for reviewing voting changes submitted by covered jurisdictions for administrative pre-

clearance. The Attorney General also has authority under the Act to bring actions to prevent unprecleared changes from taking effect. The Court's resolution of these cases will affect the scope of the Attorney General's duties under Section 5.

On April 11, 1991, in response to this Court's invitation, the Solicitor General submitted a brief expressing the views of the United States. The brief generally supported appellants' position and recommended that the Court note probable jurisdiction in both cases. The United States also participated as an *amicus curiae* in the district court.

STATEMENT

1. On November 1, 1964 (the date Section 5 of the Voting Rights Act became applicable to appellees, see 42 U.S.C. 1973b(b)), the Etowah County Commission consisted of five members: four commissioners elected at large but required to reside in separate "residency districts," and a chairman elected at large. J.S. App. A4.¹ The four commissioners each exercised complete control over a road shop, crew and equipment in their respective residency districts. *Ibid.* The commission allocated road funds to each district based on projected need. *Ibid.* The four "road commissioners" then unilaterally determined work priorities in their own districts. *Ibid.*

In 1986, the Commission entered into a consent decree resolving litigation under Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973. J.S. App. A4-A5. The decree expanded the Commission to six members, all of whom eventually would be elected from single-member districts. *Id.* at A5. Two commissioners were elected from districts in December 1986; Appellant Presley, the

¹ The district court's opinion is reproduced in the appendices to the Jurisdictional Statements in both No. 90-711 and No. 90-712; references herein to "J.S. App." may be found in the appendix to either filing.

first black commissioner in Etowah County in recent history, is one of these two. Under the decree, two of the at-large holdovers ran from districts and were elected in 1988; the other two were to run from districts in 1990. *Ibid.*

The consent decree specified that the commissioners elected in 1986 were to have the same duties as the four holdovers. J.S. App. A5. In August 1987, however, the Commission passed a "road supervision" resolution providing that each of the four holdover commissioners would continue to exercise authority over road operations in their districts. *Ibid.* The resolution further provided that the "old four" would oversee road work throughout Etowah County. *Id.* at A5-A6. The resolution assigned non-road duties to the two new commissioners. *Id.* at A6. The effect of the resolution was to strip the two new commissioners of any supervisory authority over road operations. Not surprisingly, the road supervision resolution was passed by a vote of four to two, over the opposition of the two new commissioners. *Id.* at A5.

On the same day, the Commission adopted a second resolution by an identical vote of four to two. J.S. App. A6-A7. This resolution abolished the practice of allocating road funds to districts. Instead, the resolution provided that road funds would be retained in a common fund for use without regard to district lines. *Ibid.* The effect of this "common fund" resolution was to transfer authority to determine funding priorities from individual commissioners to the entire commission. Neither the road supervision resolution nor the common fund resolution was submitted for preclearance.

2. On November 1, 1964, the Russell County Commission consisted of three members elected at large from "residency districts." J.S. App. A2. In 1972, as a result of a court order to comply with the one-person, one-vote rule, the Commission was expanded from three to five members. Phenix City, the largest city in the county, became the fourth residency district; two commissioners were required to reside there. *Ibid.*

Under the system adopted in 1972, each of the three rural commissioners exercised authority over a separate road shop. J.S. App. A2. (The two Phenix City commissioners lacked such authority, because Russell County generally does not fund or maintain city roads. See *id.* at A2 n.2). The three rural commissioners each set road work priorities, bought equipment, and hired and managed personnel within their districts. *Id.* at A2-A3. Each commissioner also approved funding for routine work. *Id.* at A3. Funding for new or major construction, however, required Commission approval. *Id.* at A3 n.3. A county engineer, appointed by the Commission, assisted the road commissioners in carrying out their responsibilities. *Id.* at A3.

In 1979, after an investigation uncovered corruption in Russell County's road operations, the Alabama legislature enacted a statute transferring all responsibility for road work to the county engineer. J.S. App. A3. The 1979 statute requires the engineer to perform road work without regard to district lines, thereby establishing what is known as a "unit system." *Ibid.* The 1979 statute was not submitted for preclearance.

In 1985, the Commission entered into a consent decree to resolve litigation under Section 2 of the Voting Rights Act. J.S. App. A4. Under this decree, the Commission was expanded from five to seven members, with each member elected from a single-member district. *Ibid.* Appellants Mack and Gosha were elected to office under this system in 1986, and became the first two black commissioners in recent history. *Ibid.*

3. In 1989, appellants filed suit in federal district court alleging that the conduct of road operations in Etowah and Russell Counties violated previous court orders, the Fourteenth and Fifteenth Amendments, Title VI of the Civil Rights Act of 1964, and Section 2 of the Voting Rights Act. J.S. App. A7. Thereafter, appellants amended their complaint to allege that Russell County's failure to preclear its transfer of road authority to the

county engineer, and Etowah's failure to preclear the road supervision and common fund resolutions, violated Section 5 of the Voting Rights Act. *Ibid.* A three-judge court was convened to consider the Section 5 claims. *Id.* at A7-A8.

The court held that transfers of authority are subject to Section 5 preclearance when they "effect a significant relative change in the powers exercised by governmental officials elected by, or responsible to, substantially different constituencies of voters." J.S. App. A13-A14. Since minority groups often have different levels of voting strength in different constituencies, the court explained, a transfer of authority from an official elected by one constituency to an official elected by another may have a potential for discrimination. *Id.* at A14. Such a potential is unlikely to exist, the court thought, when the officials are elected by the same constituency. *Ibid.* Even when officials with different constituencies are involved, the court added, "minor or inconsequential" transfers of authority do not have a "significant potential impact on voting rights." *Ibid.*

Applying these principles, the court concluded that Russell County's transfer of road supervision authority from the individual commissioners to the county engineer was not a change covered by Section 5, because both the commissioners and the engineer ultimately were answerable to the same constituency—the entire Russell County electorate. J.S. App. A16-A18. Although individual commissioners were required to reside in a particular district, the court explained, they "were elected by, and thus politically responsible to, all the voters of Russell County." *Id.* at A16. Similarly, the county engineer, although appointed, is responsible to the commission, and that body is responsible to all county voters. *Id.* at A16-A17.

The court also concluded that Etowah County's common fund resolution did not require preclearance. The court acknowledged that the common fund resolution transferred authority between officials with different con-

stituencies. Before enactment of the resolution, individual commissioners elected from, or facing election from, single-member districts could determine priorities for road repair in their own districts; afterwards, the entire commission had this authority. J.S. App. A18-A19. The court nonetheless concluded that this change did not affect voting since the power to set internal priorities was "minor and inconsequential" compared to the entire commission's authority, both before and after the resolution, to determine the amount of money to be allocated to each district. *Id.* at A19.

In contrast, the court held that Etowah County's road supervision resolution was covered by Section 5. J.S. App. A20-A21. The court concluded that "[t]he potential for discrimination posed by this change is blatant and obvious." *Id.* at A20. The court explained that "[w]hereas before 1987 all the voters of Etowah County participated in choosing the commissioners responsible for road management, the 1987 resolution stripped the voters in [two] districts * * * of any electoral influence over such commissioners." *Ibid.* Thus, "[a]uthority over the most important aspect of county governance was shifted from officials responsible to the entire county to officials (albeit the same individuals) responsible to only two thirds of the county's voters." *Id.* at A20-A21.²

Judge Thompson dissented in part. He agreed with the majority that Etowah County's road supervision resolution was subject to the preclearance requirement, but dissented from the court's conclusion that the common fund resolution did not require preclearance. J.S. App. A27-A33. In concluding that the power to set internal priorities was comparatively insignificant, Judge Thompson said, the majority ignored the realities of road operations in Etowah County. *Id.* at A32. The allocation of funds among districts "has never been a bone of con-

² Etowah County subsequently repealed the road supervision resolution, and has not cross-appealed from this portion of the district court's ruling. 90-711 Mot. to Aff. 2 n.3.

tention." *Ibid.* Instead, a "commissioner's real authority lies * * * in how those funds are used after they are allocated." *Ibid.* In Judge Thompson's view, "[t]he common fund resolution and the road supervision resolution, working together, took this authority away from the two new commissioners and gave it exclusively to the four holdover commissioners." *Ibid.*

Judge Thompson also dissented from the court's conclusion that Russell County's transfer of road authority from individual commissioners to the county engineer did not constitute a change affecting voting. J.S. App. A33-A35. According to Judge Thompson, the court's holding ignored the possibility that the commissioners might have been more accountable to voters in their residency districts than to those outside their districts. *Id.* at A34. More fundamentally, Judge Thompson disagreed with the majority's conclusion that transfers of authority are covered by Section 5 only when they occur between officials with different constituencies. Pet. App. A35-A36. The question whether there is a potential for discrimination, he thought, should not be decided on the basis of a rigid rule. *Id.* at A37-A38. If a limiting principle were required, Judge Thompson stated, he would find it sufficient for plaintiffs to show that "there has been a *significant* and *fundamental* change in the nature of the duties traditionally exercised by elected officials." *Id.* at A38.

SUMMARY OF ARGUMENT

1. A change in the decisionmaking power of an elected official is a change "with respect to voting" covered by Section 5 of the Voting Rights Act. Congress intended Section 5 to be applied broadly. In deciding whether a change is subject to preclearance, the court's inquiry is limited to whether the change has the *potential* for discrimination. See *NAACP v. Hampton County Election Comm'n*, 470 U.S. 166, 181 (1985). Moreover, any change with respect to voting, no matter how small or minor, is

subject to preclearance. See *Allen v. State Bd. of Elections*, 393 U.S. 544, 566-568 (1969). In addition, it is now firmly established that Section 5 applies not only to practices that directly affect voter registration and balloting, but to all practices that affect "the power of a citizen's vote." *Id.* at 569.

Some reallocations of the power of elected officials plainly affect the power of a citizen's vote. For example, eliminating all the powers of an elected body would reduce citizens' votes for members of that body to a nullity. Because such changes could have a racial purpose or effect, they have the potential for discrimination and are covered by Section 5.

If all reallocations of authority were outside the scope of Section 5, a covered jurisdiction could negate the election of a candidate favored by minority voters simply by reallocating the successful candidate's authority to other elected or appointed officials. That would defeat the purpose of Section 5, which is to bar measures that would "evade the remedies for voting discrimination contained in the Act itself." *South Carolina v. Katzenbach*, 383 U.S. 301, 335 (1966). Accordingly, the lower courts and the Department of Justice consistently have recognized that some reallocations of authority are covered by Section 5.

We agree with the district court that not all changes in the powers of elected officials are subject to preclearance. But we disagree with the standard devised by the district court, which requires preclearance only if the change involves (1) officials responsible to different constituencies, and (2) relatively important duties. In our view, transfers of authority are covered by Section 5 when they implicate an elected official's *decisionmaking* authority. Such changes go to the core of a citizen's voting power, and therefore are subject to preclearance.

The district court erred in concluding that transfers between officials who serve the same constituency have no potential for discrimination. Transfers of power from

a larger to a smaller body, or from a body for which single-shot voting is permitted to one for which such voting is prohibited, for instance, obviously have the potential to be discriminatory, even though both bodies are elected by the same constituency. In fact, the Attorney General has objected to transfers of authority between officials serving the same constituency on at least three occasions. In addition, the "same constituency" rule is inconsistent with this Court's decision in *City of Lockhart v. United States*, 460 U.S. 125 (1983), which held that expansion of a body from three to five members required preclearance even though both the smaller body and the larger body were elected by the same constituency.

The district court also erred in concluding that relatively unimportant transfers of authority are not subject to preclearance. The statute plainly states that Section 5 applies to "any * * * standard, practice, or procedure with respect to voting," 42 U.S.C. 1973c (emphasis added), and it is well settled that there is no *de minimis* exception to the preclearance requirement. See *Allen*, 393 U.S. at 566. An exception for "minor" transfers of authority would be difficult to administer and would undermine the prophylactic purpose of Section 5. The district court's standard also blurs the distinction between the question whether a change is subject to preclearance (which turns on whether changes of that type have the potential for discrimination) and the question whether the change should be precleared (which turns on whether the particular change at issue would have a discriminatory purpose or effect). Because changes in the decisionmaking power of an elected official have the potential for discrimination, all such changes are subject to preclearance. Whether the purpose or effect is present, and the weight to be given the State's legitimate interests, are matters to be considered after the submission has been made.

2. The reallocations of authority at issue here must be submitted for preclearance. In Russell County, decision-

making authority concerning road matters was transferred from individual commissioners elected at large to a county engineer appointed by the commission. Similarly, Etowah County's common fund resolution transferred authority to decide the priority of road projects from individual commissioners elected from single-member districts to the commission as a whole.

ARGUMENT

I. A CHANGE IN THE DECISIONMAKING POWER OF AN ELECTED OFFICIAL IS A CHANGE WITH RESPECT TO VOTING REQUIRING PRECLEARANCE UNDER SECTION 5

The central question presented by these appeals is whether a change in the decisionmaking authority of an elected official is a change "with respect to voting" under Section 5 of the Voting Rights Act of 1965. The district court held that such changes are covered by Section 5, but only when they involve a "significant relative change" in power between officials who are "elected by, or responsible to, substantially different constituencies of voters." J.S. A13-A14. We agree that a change in an elected official's authority can be a change with respect to voting. In our view, however, a change in the decisionmaking authority of an elected official is covered by Section 5 even if the officials involved are responsible to the same constituency, and even if the authority at issue may be viewed as relatively minor or inconsequential. Under this standard, the changes at issue here require pre-clearance.

A. Section 5 Applies To All Changes That Affect "The Power Of A Citizen's Vote"

Section 5 of the Voting Rights Act provides that certain States and political subdivisions, including appellees, may not implement "any voting qualification or prerequisite to voting, or any standard, practice, or procedure

with respect to voting" without first obtaining preclearance from the United States District Court for the District of Columbia or the Attorney General. 42 U.S.C. 1973c. To receive preclearance, a covered jurisdiction must show that a proposed change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or [membership in a language minority group]." *Ibid.*

This Court has recognized that Section 5 draws a sharp distinction between the procedural question whether a change is subject to preclearance and the substantive question whether the change should be precleared. In deciding the first question, a court may not inquire into whether the change has a discriminatory purpose or effect. See *NAACP v. Hampton County Election Comm'n*, 470 U.S. 166, 181 (1985); *McCain v. Lybrand*, 465 U.S. 236, 250 n.17 (1984); *Perkins v. Matthews*, 400 U.S. 379, 383-385 (1971). Instead, the inquiry is limited to whether the challenged alteration has the "potential for discrimination." *Hampton County*, 470 U.S. at 181; *Dougherty County Bd. of Educ. v. White*, 439 U.S. 32, 42 (1978). Moreover, a court may not exempt from preclearance changes it views as insignificant. The plain language of the statute makes the preclearance requirement applicable to *any* change with respect to voting, no matter how small or minor. See *Allen v. State Bd. of Elections*, 393 U.S. 544, 566-568 (1969) ("It is significant that Congress chose not to include even * * * minor exceptions in § 5, thus indicating an intention that all changes, no matter how small, be subjected to § 5 scrutiny."). See also *Perkins v. Matthews*, 400 U.S. at 387. See generally *Hallstrom v. Tillamook County*, 493 U.S. 20, 25 (1989) (Courts "are not at liberty to create an exception where Congress has declined to do so").

The Voting Rights Act defines "vote" and "voting" to include "all action necessary to make a vote effective." 42 U.S.C. 1973l(c) (1). Relying on this broad definition, and Congress's refusal to make any exceptions to Section 5's

preclearance requirement, this Court held in *Allen* that Section 5 is not limited to changes directly affecting the casting of a ballot. 393 U.S. at 563-569. The Court explained that "[t]he right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot." *Id.* at 569. *Allen* held, *inter alia*, that a change from district to at-large voting, and a change from an elected county superintendent of education to a superintendent appointed by the board of education, were covered by Section 5.³ 393 U.S. at 569-570.

In subsequent cases, this Court has reaffirmed the broad definition of Section 5 coverage adopted in *Allen*. In *Perkins v. Matthews*, 400 U.S. 379 (1971), the Court held that annexations which enlarge the number of eligible voters are covered by Section 5 because they dilute "the weight of the votes of the voters to whom the franchise was limited before the annexation." 400 U.S. at 388. In *Georgia v. United States*, 411 U.S. 526, 532-533 (1973), the Court held that Section 5 applies to legislative reapportionments since they too can dilute minority voting power. And in *City of Lockhart v. United States*, 460 U.S. 125, 131-132, 134-135 (1983), the Court held that the preclearance requirement applies to the introduction of numbered posts and staggered terms, because such devices may frustrate the use of single-shot voting, a technique that permits minority voters to concentrate their vote behind a single candidate. *Id.* at 135.

Congress reenacted Section 5 in 1970, 1975, and 1982. With each reenactment, Congress has reaffirmed the validity of *Allen*'s interpretation of congressional intent. See S. Rep. No. 417, 97th Cong., 2d Sess. 6-7 (1982); S. Rep. No. 295, 94th Cong., 1st Sess. 16 (1975); *Dougherty County Bd. of Educ.*, 439 U.S. at 38-39; *Georgia v. United States*, 411 U.S. at 533. Thus, it is now firmly established that the preclearance requirement applies not only to prac-

³ In all, the Court's opinion in *Allen* decided three consolidated cases from Mississippi and one case from Virginia. See 393 U.S. at 547.

tices that directly affect the process by which voters are registered and cast their ballots, but also to all practices that affect "the power of a citizen's vote." *Allen*, 393 U.S. at 569.

B. Some Reallocations Of Authority Are Covered By Section 5

Some changes in the powers of an elected official plainly affect the power of a citizen's vote and therefore are covered by Section 5. To take an extreme example, a change eliminating *all* of a county commission's powers and making that body purely ceremonial would reduce the citizen's vote for county commissioners to a virtual nullity. Cf. *Allen*, 393 U.S. at 569-570 (change making an elective office appointive is covered by Section 5). Less drastic changes in the authority of an elected body can also affect the power of a citizen's vote. For example, stripping a school board of its power to set the tax rate would diminish the voting power of citizens who vote in school board elections, even if the school board were to retain other significant powers. After the change, a vote for school board members, although not meaningless, would mean less than it did before. And such a diminution in voting power could have a racial purpose or effect and thus have the potential for discrimination.

Although this Court has not yet decided whether changes in the powers of an elected official or group of officials are covered by Section 5, the Court has held that a change from a three-member elected body to a five-member elected body required preclearance, because it changed the voting power of the individual members of the three-member body. *City of Lockhart v. United States*, *supra*. As the Court explained in *Lockhart*, "[i]n moving from a three-member commission to a five-member council, [the city] has changed the nature of the seats at issue. * * * For example, [two of the old seats] now constitute only 40% of the council, rather than 67% of the commission." 460 U.S. at 131. Given *Lockhart's* hold-

ing that reducing the power of an individual *member* of an elected body by increasing the size of the body requires preclearance, it is difficult to see how reducing the power of the entire elected *body* can fall outside the scope of Section 5.⁴

A decision excluding all reallocations of authority from the scope of Section 5 would have far-reaching consequences. Since the enactment of the Voting Rights Act, minority voters in many jurisdictions have elected candidates of their choice to office for the first time in recent history. If transfers of authority were not subject to preclearance, a jurisdiction could negate the election of a minority candidate to a governing body by taking away the official's authority and reallocating it to other officials over whom minority voters have less influence. This would defeat the purpose of Section 5, which is to prevent covered jurisdictions from implementing measures that would "evade the remedies for voting discrimination contained in the Act itself." *South Carolina v. Katzenbach*, 383 U.S. 301, 335 (1966).

The Etowah County case illustrates this danger. Immediately after a minority-supported candidate was elected to office for the first time in recent memory, the commission stripped him of all authority over road work. The district court found that the potential for discrimination against minority voters posed by this change was "blatant and obvious." J.S. App. A20.

The lower courts have uniformly concluded that a change in the authority of elected officials can be a change with respect to voting. In *Horry County v. United*

⁴ In *McCain v. Lybrand*, 465 U.S. 236 (1984), state legislation changed the governing body of a county from an appointed commission to an elected council with increased legislative powers. The parties stipulated that this legislation incorporated changes with respect to voting, and the Court therefore was not required to address the issue. The Court nevertheless noted that "several changes are suggested," including "the basic reallocation of authority from the state legislative delegation to the Council." 465 U.S. at 250 n.17.

States, 449 F. Supp. 990 (D.D.C. 1978) (three-judge court), a state statute increased the powers of the county commission and provided that commissioners would be elected rather than appointed by the governor. The statute also transferred most of the duties of the county chairman to an administrator appointed by the commission. The court held that the first change "reallocate[d] governmental powers among elected officials voted upon by different constituencies," and therefore was subject to preclearance. *Id.* at 995. The court also concluded that the duties of the chairman "are sufficiently different that in this respect [the statute] constitutes a change in electoral practices requiring preclearance under Section 5 of the Voting Rights Act." *Ibid.* Similarly, in *Hardy v. Wallace*, 603 F. Supp. 174 (N.D. Ala. 1985) (three-judge court), a state statute transferred the authority to appoint the Greene County racing commission from the county's state legislative delegation to the governor. The court held that this change was subject to Section 5 preclearance because of "its effect on the power of the voters." *Id.* at 178. The court explained that "the transfer of appointment authority to the governor, over 99.7% of whose constituents are not inhabitants of Greene County, substantially dilutes the power of the voters in Greene County by effectively eliminating the power of such voters over the Commission." *Id.* at 179.⁵ See also *County Council of Sumter County v. United States*, 555 F. Supp. 694 (D.D.C. 1983) (three-judge court) (transfer

⁵ The Department of Justice originally concluded that the legislation at issue in *Hardy v. Wallace* was subject to preclearance, relying in part on *Horry County v. United States*, *supra*. See 603 F. Supp. at 179-180 (decision letter of June 18, 1984). On reconsideration, the Department concluded that while "it would be wrong to conclude that no reallocation of governmental power can ever be considered a change 'with respect to voting,'" the particular change at issue was not covered by Section 5. See 603 F. Supp. at 181-182 (decision letter of Oct. 31, 1984). Further experience with Section 5 has now led us to the view that we were right the first time, as the court in *Hardy v. Wallace* determined. See pp. 17-23, *infra*.

of legislative power formerly shared by county legislative delegation, state legislature, and governor to local governing body requires preclearance); *Robinson v. Alabama State Dep't of Educ.*, 652 F. Supp. 484 (M.D. Ala. 1987) (transfer of authority from county school board to city school board requires preclearance).

The Attorney General, whose interpretation of Section 5 is entitled to "considerable deference," *NAACP v. Hampton County Election Comm'n*, 470 U.S. at 178-179, has long treated certain changes in the power of elected officials as changes with respect to voting. The Department of Justice first focused on reallocations of authority in 1975, when South Carolina enacted "home rule" legislation authorizing its counties to adopt their own forms of local government and to assume increased powers. The Department precleared this enabling legislation, but notified the State that each implementation of it by a local government would require a separate preclearance. The State sought clarification of whether preclearance would be required in cases in which the county assumed increased powers but retained its existing form of government. In response, the Department stated that "changes in the powers and duties of the governing entity brings the transition within the purview of Section 5 even though the structure of the governing body remains the same." Letter from J. Stanley Pottinger to Daniel R. McLeod (Dec. 19, 1975) *reprinted in App., infra*, 2a. Since 1975, the Department of Justice consistently has treated home rule and other similar transfers of authority as changes with respect to voting requiring preclearance under Section 5. During this period, we have objected to transfers of authority on at least eight occasions.⁶ In addition, the

⁶ The Department has objected to the following transfers of authority: (1) Mobile, Alabama, March 2, 1976, involving a transfer of administrative duties from the entire commission to individual commissioners; (2) Charleston, South Carolina, June 14, 1977, involving a transfer of taxing authority from the legislative delegation to the county council; (3) Edgefield County, South Carolina,

Department has precleared numerous other transfers of authority submitted by jurisdictions after finding the absence of discriminatory purpose and effect.

C. Changes In The Power Of Elected Officials Are Subject To Preclearance When The Changes Reallocate Decisionmaking Authority

In our view, the hard question in this case is not whether a change in the power of an elected official can ever constitute a change with respect to voting requiring preclearance under Section 5—it plainly can—but rather whether the district court employed the correct standard to distinguish those changes that require preclearance from those that do not. The Department of Justice considered this question when it amended its Section 5 regulations in 1987, but did not attempt to provide an all-encompassing answer. At that time, we stated that “[w]hile we agree that some reallocations of authority are covered by Section 5 (*e.g.*, * * * ‘home rule’), we do not believe that a sufficiently clear principle has yet emerged distinguishing covered from noncovered reallocations.” J.S. App. A15 n.13.

Since 1987, several cases, including this one, have forced us to grapple with this issue further and have led us to conclude that transfers of authority that implicate

February 8, 1979, involving a transfer of increased taxing power to the county council; (4) Colleton County, South Carolina, September 4, 1979, involving a transfer of authority to tax for school purposes from the legislative delegation to the county council; (5) Brunswick and Blynn County, Georgia, August 16, 1982, involving the abolition of separate city and county commissions and the transfer of their powers to a consolidated commission; (6) Hillsborough County, Florida, August 29, 1984, involving a transfer of power over municipalities from the legislative delegation to the county commission (objection was withdrawn because the county made clear that it did not intend to effect such a transfer); (7) Waycross, Georgia, February 16, 1988, involving a change in the duties of the mayor; and (8) San Patricio, Texas, May 7, 1990, involving a transfer of voter registration duties from the county clerk to the county tax assessor.

an elected official's *decisionmaking authority* are covered by Section 5. Changes that affect an elected official's authority to make decisions—to legislate, tax, spend, set school curricula, approve road and bridge projects, and so forth—go to the core of the citizens' voting power. Changes that do *not* affect an official's power to make decisions generally have no such potential to dilute the power of a citizen's vote. Although such changes may be of interest to the officeholders, officeholders are not protected by Section 5. Accordingly, such changes are outside the scope of Section 5.⁷

The district court adopted a different standard for distinguishing between covered and uncovered changes. According to the district court, transfers in authority are covered only when they (1) involve officials who are responsible to different voting constituencies, and (2) the duties transferred are not minor or inconsequential. These limitations cannot be squared with the language and purposes of Section 5.

⁷ The decision in *Rojas v. Victoria Indep. School Dist.*, Civ. A. No. V-87-16 (S.D. Tex. Mar. 29, 1988), *aff'd*, 490 U.S. 1001 (1989), illustrates this distinction. In *Rojas*, a school board replaced its rule that any board member could place items on the board's agenda with a rule giving the board president authority to require that items be placed on the agenda only at the request of two board members. This change did not affect the range of matters over which the school board could make decisions. Nor did it affect the power of individual members to influence those decisions, since decisions of the board required a majority vote both before and after the change. Moreover, the board's rules of procedure required a second to initiate discussion or bring a matter to a vote. Accordingly, the new agenda setting policy was not a change "with respect to voting" requiring preclearance under Section 5. For the same reason, a transfer of authority from a legislative body to a committee to make recommendations concerning proposed legislation would not be covered by Section 5, because the entire body retains the authority to decide whether to adopt the legislation. More generally, a transfer of authority to give advice or make recommendations would also be outside the reach of Section 5.

1. *The District Court's "Different Constituency" Rule Is Too Narrow*

The district court correctly recognized that transfers between officials with different voting constituencies can create the potential for discrimination, since "identifiable racial or ethnic groups of voters will often have different levels of voting strength in different constituencies." J.S. App. A14. The court erred, however, in concluding that transfers of authority between officials who serve the same constituency have no discriminatory potential.

To cite one example, if two elected bodies serve the same constituency, but one has many members while the other has only a few, minority voters may have a greater opportunity to elect a candidate of their choice to the larger body. See *City of Lockhart*, 460 U.S. at 136 (minority voters elected a candidate of their choice for the first time when the council expanded from three to five members). Consequently, a transfer of authority from the larger to the smaller body would have the potential to discriminate against minority voters. Similarly, if minority voters use single-shot voting to elect their preferred candidate to a county school board, and the authority to tax for school purposes is then shifted to a county commission where single-shot voting is prohibited, there is a potential for diluting minority voting strength, even if both the school board and the commission are elected at large by all residents of the county. Still again, if minority voters elect a mayor of their choice because of special circumstances (*e.g.*, the minority candidate ran unopposed, see *Thornburg v. Gingles*, 478 U.S. 30, 51 (1986)), and authority to appoint city officials is then transferred to the city council, the change is potentially discriminatory even where both the mayor and the city council are chosen by the same electorate.

Our disagreement with the district court's "different constituency" rule is by no means academic. On at least three occasions, the Attorney General has objected to transfers of authority between officials serving the same

constituency. In one case (Mobile, Alabama, March 2, 1976), a three-member commission elected at-large sought to transfer administrative responsibilities exercised by the entire commission to individual members of the commission. Our investigation disclosed that the purpose of this reallocation was to forestall any possibility of a change to single-member districts (on the theory that it would be inappropriate to permit one area of the city to elect an official with city-wide responsibilities). In another case (Colleton County, South Carolina, September 4, 1979), the State transferred the authority to levy taxes for school purposes from the county's state legislative delegation to the county council, both of which were elected at-large by county residents. Our investigation uncovered evidence that the representatives to the legislative delegation had sought the support of black voters and had been responsive to their needs, while representatives to the county council had not. In the third case (San Patricio, Texas, May 7, 1990), the Attorney General objected when a county transferred the authority to register voters from the county clerk to the county tax assessor, both of whom are elected at-large by the entire county. Our investigation revealed that the purpose of the change was to retaliate against the county clerk for cooperating in a Section 5 review of an unrelated voting change. These objections demonstrate that the district court's "different constituency" test too narrowly defines the circumstances under which preclearance should be required.

In addition, the district court's "different constituency" rule is inconsistent with *Lockhart*. As discussed above, this Court held that the transfer of power from a three-member body to a five-member body was covered by Section 5, even though both bodies served the same voting constituency. Under the district court's "same constituency" rule, such a change would be outside the scope of Section 5. See also *Horry County*, 449 F. Supp. at 995-996 (transfer of administrative functions from chair-

man elected at-large to administrator appointed by Council elected at large is a covered change).

2. There Is No Exception To Section 5 For Minor Changes

The district court also erred in holding that transfers of authority that can be characterized as relatively minor or inconsequential need not be precleared under Section 5. The district court concluded that such transfers do not require preclearance because they do not have "a significant potential impact on voting rights." J.S. App. A14. But that is not the statutory test; as noted above, the preclearance requirement is not limited to changes with a "significant" impact on voting rights. On the contrary, the language of the statute makes the preclearance requirement applicable to "any * * * standard, practice, or procedure with respect to voting," no matter how small or minor. 42 U.S.C. 1973c; see *Allen*, 393 U.S. at 566. When minority voters lose the power to use their vote to affect a governmental decision, their voting power has been diminished. That they retain the power to influence what a court may regard as more important matters does not redeem that loss.

Not only does the district court's approach lack roots in the statute itself, but its standard would be difficult to administer. In many cases, the Department of Justice would find it necessary to conduct an extensive investigation simply to decide whether a change is subject to preclearance. Covered jurisdictions would face a similar burden in deciding whether they are required to submit a change. Even after investigation, it may not be clear on which side of the line a particular change falls. Matters that are very important to some voters may be of no importance at all to others. For these reasons, the district court's standard would invite litigation in every case to determine the question of coverage. That baleful result would defeat the purpose of administrative preclearance, which is "to provide a speedy alternative method of com-

pliance to covered States.” *Morris v. Gressette*, 432 U.S. 491, 503 (1977). More fundamentally, the district court’s standard would undermine the prophylactic purpose of Section 5 by permitting the covered jurisdiction to decide whether a transfer of authority is important enough to require preclearance. See *McCain*, 465 U.S. at 246 (Section 5 must be interpreted “in light of its prophylactic purpose and the historical experience which it reflects”).

3. *The District Court’s Standard Confuses The Questions Whether A Change Is Subject To Preclearance And Whether The Change Should Be Precleared*

The district court’s standard also blurs the distinction between the procedural question whether a change must be submitted for preclearance and the substantive question whether the change should be precleared. This Court’s decision in *Perkins v. Matthews*, *supra*, illustrates the difference between these two inquiries. In *Perkins*, the district court held that a jurisdiction’s annexation did not have to be precleared because blacks still constituted a majority of the voters after the annexation. 400 U.S. at 385-386. Similarly, the court did not require the jurisdiction to preclear a change from single-member districts to at-large elections because blacks would still have the power to elect the candidates of their choice in at-large elections. Finally, the district court held that changes in the location of polling places did not require preclearance since the changes were dictated by necessity.

This Court reversed, holding that the district court had effectively inquired into the *merits* of whether the changes had the purpose or effect of discriminating against minority voters—a function reserved for the Attorney General and the United States District Court for the District of Columbia. 400 U.S. at 386. The Court explained that annexations that enlarge the number of eligible voters, changes to at-large election systems, and changes in polling places are practices that can, in particular cases, dis-

criminate against minority voters. Accordingly, this Court held that all such changes must be precleared. *Id.* at 387-394.

That principle applies here. A change in the decision-making power of an elected official has an effect on the voting power of those who vote for that official, and that type of change has the potential to discriminate against minority voters. Accordingly, all such changes must be submitted for preclearance, including those that appear innocuous. To be sure, a showing that the officials serve the same constituency, and that the transfer is a minor one, may be important evidence that a transfer of authority is without a discriminatory purpose or effect and should be precleared. But those factors do not eliminate the requirement that the change undergo the preclearance process.⁸

II. THE CHANGES AT ISSUE HERE REALLOCATED THE DECISIONMAKING POWERS OF ELECTED OFFICIALS, AND THEREFORE ARE SUBJECT TO PRECLEARANCE UNDER SECTION 5

For the reasons discussed above, the reallocations of authority at issue here must be submitted for preclearance under Section 5. In Russell County, decisionmaking authority over road matters was transferred from indi-

⁸ We have no quarrel with the district court's observation that Section 5 "is not to be stretched beyond the point of reason and beyond its legitimate purposes." J.S. App. A22 n.21. Congress did not intend to overwhelm the Attorney General with preclearance submissions. Cf. *Clark v. Roemer*, No. 90-952 (June 13, 1991), slip op. 11. Nor did it intend to require the States to delay implementation of any and all changes that can be linked to voting through an imaginative exercise in the conceivable. But these concerns are satisfied by limiting Section 5 coverage to changes in an elected official's decisionmaking authority. Unlike the district court's standard, this approach is consistent with the language and legislative history of Section 5, is faithful to its prophylactic purpose, and affords a reasonable degree of certainty about whether a particular change is covered.

vidual commissioners, elected at large from residency districts, to the county engineer, who is appointed by the Commission. The district court held that the change was not covered because it involved officials who serve the same constituency. For the reasons noted above, however, that is not sufficient to eliminate the potential for discrimination and therefore does not place the change outside the scope of Section 5. The public policy reasons for adopting the unit system may well support preclearance once the change is submitted. And the fact that the commissioners are answerable to all the voters of Russell County, and the county engineer is answerable to the commissioners, may also support the County's argument for preclearance.⁹ But those facts do not obviate the need to go through the process.

The Etowah common fund resolution also requires preclearance. That resolution removed the power of individual commissioners to decide which road projects in their districts would receive priority. Consequently, it involved a transfer of decisionmaking power concerning "the most important aspect of county governance" (J.S. App. 20) from one set of officials to another. See Ala. Code § 23-1-80 (1975 & Supp. 1990) (principal responsibility of county commissions is to maintain roads and bridges). The district court held that preclearance was

⁹ Although the district court concluded that the county commissioners and the county engineer answered to the same constituency, in fact appointed officials generally are not "answerable" to the electorate in the same sense as elected officials. (If they were, changes in the authority of *appointed* officials would be no less subject to preclearance than changes in the decisionmaking authority of *elected* officials.) Appointed officials may be subject to job protection of various kinds that insulates them from elected officials and voters. Even where an appointed official serves at the pleasure of an elected official, moreover, a vote against the elected official does not automatically translate into a "vote" against the appointed official. See *Allen*, 393 U.S. at 569-570 (holding that change from elected superintendent of education to superintendent appointed by the board of education is subject to preclearance).

not required because the power to set internal priorities is not as important as the power to determine overall funding. While this may be so, voters clearly have an interest in how both functions are performed. If the road to a voter's home is one the voter's commissioner would schedule for paving but the county commission as a whole would not, the transfer of authority to set road work priorities from the former to the latter may be—to that voter—an extremely important change.

The Etowah common fund resolution was passed while the Commission was undergoing a transition from an at-large system to single-member districts. Good government considerations might well call for different allocations of powers depending on whether members of an elected body serve specific districts or at large. At-large members may, for example, be expected to have the concerns of the entire county in mind in setting priorities, while members serving only a specific district might have more parochial concerns. The State's legitimate public policy reasons for a change are appropriately weighed in determining whether that change should be precleared. See *Houston Lawyers' Ass'n v. Texas Attorney General*, Nos. 90-813 & 90-974 (June 20, 1991), slip op. 6 ("State's justification for its electoral system is a proper factor for the courts to assess in a racial vote dilution inquiry."). But the facts of the Etowah County case illustrate why such justifications should be weighed during the preclearance process. As a result of the common fund resolution, individual commissioners were stripped of their power to determine district funding priorities almost immediately after minority voters were able to elect a commissioner of their choice for the first time. Such a change clearly warrants Section 5 review.¹⁰

¹⁰ In No. 90-712, appellants contend (J.S. 4-6) that a change with no potential for discrimination at the time it is implemented (and therefore not subject to preclearance), may nevertheless become subject to preclearance at a later date if subsequent changes—here, a change from at large voting to single member districts—create a

CONCLUSION

The district court's judgment should be reversed, and the case should be remanded for the entry of appropriate relief.

Respectfully submitted.

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JULY 1991

potential for discrimination. In our view, the changes at issue in this case were subject to the preclearance requirement at the time they were made. Accordingly, the Court need not reach this additional contention. But if the Court were to reach this question, the position of the United States is that a change not subject to preclearance at the time it is implemented may not thereafter become subject to preclearance because of subsequent, unanticipated changes. The rule appellants argue for is not derived from the language or legislative history of Section 5, and would impose an unwarranted degree of uncertainty on state and local governments. Of course, efforts to evade the preclearance requirement by implementing a covered change in two or more steps are subject to preclearance. In addition, if a covered jurisdiction fails to submit a change that is subject to preclearance, and the Department of Justice thereafter reviews it, it will consider intervening developments in determining whether to interpose an objection. See *City of Rome v. United States*, 446 U.S. 156, 186 (1980).

APPENDIX

[Dec. 19, 1975]

Honorable Daniel R. McLeod
Attorney General
State of South Carolina
P.O. Box 11549
Columbia, South Carolina 29211

Dear Mr. Attorney General:

This is in reference to your letter of September 9, 1975, concerning the adoption of a form of government by subdivisions in South Carolina under the provisions of Act R-396, the Home Rule Act. You requested clarification of a statement in my previous letter concerning the need for Section 5 preclearance of assigned forms of government which may include situations where no modification of existing government is involved. I apologize for the delay in responding.

With regard to counties, if a county is either assigned a form of government or retains a form of government which is identical in every respect to that which was in effect, without intervening change, since November 1, 1964, or has been implemented since November 1, 1964, and which has met Section 5 preclearance, then there would not be a change in a voting procedure within the meaning of the Voting Rights Act of 1965. However, Section 14-3701(b) provides that the type of government which will be assigned in the event a county does not elect to adopt another form of government will be a form "most nearly corresponding to the form in effect immediately prior to [July 1, 1976]". It thus appears that the Act anticipates that the exact form of government which is in effect on July 1, 1976, will probably not be assigned by operation of the Act and this

expectation would seem to be warranted at least in most cases in view of the broad new powers bestowed upon the governing body under the Home Rule Act.

In light of the Supreme Court's admonition in *Allen v. State Board of Elections*, 393 U.S. 544, 563 (1969), that Congress intended "that all changes, no matter how small, be subjected to Section 5 scrutiny", we believe that changes in the powers and duties of the governing entity brings the transition within the purview of Section 5 even though the structure of the governing body remains the same. However, in the event that procedures under the Home Rule Act should result in a county's retaining its previous form of government with powers and duties unchanged, then, of course, there would not be a change within the meaning of Section 5.

Likewise with regard to municipalities, if the form of government which a municipality adopts under the provision of Part II, Article 2, of the Act is identical to that which exists at the expiration of the period described in Section 6 of the Act, then, there would not be a change in voting under Section 5. However, if the new form of government which is selected by this municipality is different in any respect, including changes in the powers and duties of the affected entities, or if a municipality forfeits its articles of incorporation, then such action will constitute a change under Section 5.

I hope that we have been able to clarify this matter for you. If we may be of further assistance, please do not hesitate to contact us.

Sincerely,

J. STANLEY POTTINGER
Assistant Attorney General
Civil Rights Division

MOTION FILED
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Nos. 90-711 & 90-712

Supreme Court, U.S.
FILED

JUL 12 1991

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

LAWRENCE C. PRESLEY, Individually and on
Behalf of Others Similarly Situated,
Appellant,

v.

ETOWAH COUNTY COMMISSION,

ED PETER MACK and NATHANIEL GOSHA, III,
Individually and on Behalf of Others Similarly Situated,
Appellants,

v.

RUSSELL COUNTY COMMISSION,

On Appeal from the United States District
Court for the Middle District of Alabama

**MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE
AND BRIEF AMICUS CURIAE OF THE NAACP LEGAL
DEFENSE AND EDUCATIONAL FUND, INC.,
IN SUPPORT OF APPELLANTS**

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IN THE
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BEHALF OF OTHERS SIMILARLY SITUATED,
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On Appeals from the United States District
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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The NAACP Legal Defense & Educational Fund, Inc. (LDF) respectfully moves the Court for leave to file the attached brief as *amicus curiae* in support of petitioners. The *Presley* appellees have consented to the filing of this brief. The *Mack* appellees have refused to grant consent.

The NAACP Legal Defense and Educational Fund, Inc. is a non-profit corporation established to assist African American citizens in securing their constitutional and civil rights. LDF has had a major role in litigation efforts challenging discrimination in voting.¹

Given *amicus*' substantial experience in voting rights litigation, it is submitted that the brief will be of assistance

¹See, e.g., *Thornburg v. Gingles*, 478 U.S. 30 (1986). LDF represented the plaintiffs in litigation that resulted in this Court's decision that interpreted amended §2 of the Voting Rights Act, 42 U.S.C. §1973, as amended 1982. Other LDF voting rights cases include: *Chisom v. Roemer*, 59 U.S.L.W. 4696 (U.S. June 18, 1991); *Houston Lawyers Assoc. v. Atty. General of Texas*, 59 U.S.L.W. 4706 (June 20, 1991); *Jeffers v. Clinton*, 730 F.Supp.196 (E.D.Ark 1989), *sum. aff'd* 112 L.Ed. 2d 656 (1991).

to the Court. *Amicus* therefore requests that the motion be granted.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

LAWRENCE C. PRESLEY, INDIVIDUALLY AND ON
BEHALF OF OTHERS SIMILARLY SITUATED,
Appellant,

v.

ETOWAH COUNTY COMMISSION

ED PETER MACK AND NATHANIEL GOSHA, III,
INDIVIDUALLY AND ON BEHALF OF
OTHERS SIMILARLY SITUATED,
Appellants,

v.

RUSSELL COUNTY COMMISSION

On Appeals from the United States District
Court for the Middle District of Alabama

**BRIEF AMICUS CURIAE OF THE NAACP LEGAL
DEFENSE AND EDUCATIONAL FUND, INC.,
IN SUPPORT OF APPELLANTS**

SUMMARY OF ARGUMENT

In broad terms, this case asks the Court to determine how far a local district court may go in defining the scope of §5 coverage when Congress has granted exclusive jurisdiction over the issue to the District Court of the District of Columbia and the Attorney General. Appellants argue that the court below exceeded its jurisdiction in determining that changes in the fundamental authority of elected officials were too inconsequential to merit §5 review. Amicus argues that in reaching this determination, the court below impermissibly created two exceptions to §5.

First, in deciding that the changes in the authority of elected officials were inconsequential, the court below created a *de minimis* exception to §5 preclearance in violation of the statute's express mandate that all changes, no matter how small, be subject to §5 scrutiny. To effectuate §5's remedial purposes, this Court consistently has upheld this *per se* rule. Moreover, each time the Act has come up for renewal, Congress explicitly has rejected attempts to exclude even minor changes from the reach of §5. Congress' refusal to create exceptions to §5 is based on

its concern that such exceptions will exacerbate continuing lack of compliance by many covered jurisdictions.

Even if there were a *de minimis* exception, the changes at issue in this case would not fall within it. The changes fundamentally altered the authority of elected officials in ways that directly affected the duties that voters elected them to perform. Such changes had clear potential to dilute African American voting strength. This Court long has held that changes that have the potential to dilute African American voting strength are covered under §5.

Second, the court below erred in deciding that reallocations of authority among elected officials only fall within the reach of §5 when they involve changes in the constituencies of those officials. Nothing in *McCain v. Lybrand*, 465 U.S. 236 (1984), this Court's only pronouncement on the issue, supports this narrowing of §5's scope. The disputed changes in this case have a clear potential to discriminate against African American voters. The court below erred in ruling that they were not subject to §5 review.

ARGUMENT

Introduction

Twenty five years ago, Congress enacted the Voting Rights Act to "banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century." *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966). The heart of the Act is §5, a rigorous scheme aimed at frustrating the "protean efforts", *Dougherty County Bd. of Educ. v. White*, 439 U.S. 32, 38 n.6 (1978), of local officials to exclude African Americans from the political process by requiring these officials to seek federal approval, before implementation, of every new voting change enacted in their jurisdictions before such changes are implemented. Now a federal district court seeks to upset §5's well-established enforcement scheme by allowing local district courts, and ultimately local jurisdictions, unprecedented discretion to choose which voting changes have sufficient impact upon the voting process to require preclearance under the Act. The

decision of the court below reverses a quarter-century of successful civil rights enforcement.²

Prior to the voting changes at issue in this case, the Russell and Etowah County Commissioners were elected at large from residency districts. These residency districts were concurrent with the commissioners' jurisdiction over road operations in the counties. As a result of litigation in both counties, the at-large system of electing county commissioners was replaced by a single member district system. In both counties, this resulted in the election of African American representatives to the County Commissions.

Before the disputed changes, each County Commission adopted an annual budget for the entire county that allocated funds for road and bridge maintenance among the commissioners' individual districts in roughly equal amounts. Each commissioner had complete discretion to set priorities

²The Voting Rights Act has been considered one of the most successful pieces of civil rights legislation in this country's history. Its success is based in large part upon its regulatory scheme which has shifted the burden of time and inertia from the victims of discrimination to the perpetrators of that evil. *Katzenbach*, 383 U.S. at 327; *Days & Guinier Enforcement of Sections of the Voting Rights Act in MINORITY VOTE DILUTION* 167, Davidson, ed (1984).

and allocate funds for road and bridge work in his or her county. Each commissioner exercised sole management authority over the operations of his or her own road crew. Thus, like states that receive federal block grant money, each commissioner had a free hand to respond to constituents' needs in determining budget priorities.

The three enactments here at issue changed these operating procedures in both counties. In Etowah, the Common Fund Resolution³ worked in tandem with the Road Supervision Resolution⁴. Directly after the election of the first African American commissioner, it created a system in which commissioners who once exercised exclusive control over their districts were submerged within a white majority that now exercised effective control of all decisions concerning road and bridge work throughout the county. In Russell County, the change that divested the commissioners

³The resolution stripped the commissioners of individual budgetary discretion within their residency districts, and vested that authority in the incumbent-dominated body as a whole. A-19

⁴The resolution reserved the authority of the incumbent commissioners to jointly oversee all work in the county. A-20.

of authority over road operations and reposed it in the appointed county engineer had essentially the same effect.

As to the Etowah County changes, the court below held that the Road Supervision Resolution had the potential for discrimination. However, the court ruled that the Common Fund Resolution was not covered under §5. A-19. In addition, the court below held that the reallocation of authority in Russell County did not effect a change in the potential for discrimination against minority voters.

This appeal ensued.

I. The District Court Erred in Exempting from §5 Preclearance the Changes in Authority Within the Russell and Etowah County Commissions on the Ground that Such Changes Were *De Minimis*.

A. There is no *de minimis* exception to §5

Section 5 requires covered jurisdictions to seek preclearance, before implementation, of "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964." 42 U.S.C. §1973c.³ Two basic enforcement principles have been drawn from this language. First, §5 admits of no exceptions; in covered jurisdictions, *all* changes affecting voting must be federally approved. *Id.*, *Allen v. State Bd. of Elections*, 393 U.S. 544, 568 (1969). Second, the burden of reporting voting changes is on the covered jurisdiction. Submissions must be made

³ Section 4(b) of the Act sets out the criteria by which jurisdictions are designated for federal supervision. Etowah and Russell Counties are both covered jurisdictions under the Act. They are covered in part because of the State of Alabama's "unrelenting historical agenda, spanning from the late 1800's to the 1980's to keep its black citizens economically, socially, and politically downtrodden, from the cradle to the grave." *Dillard v. Crenshaw County*, 640 F. Supp. 1347, 1357 (1986). Nine of the states that are covered in their entirety are states of the former Confederacy. Thirteen other jurisdictions are covered in part.

in an "unambiguous and recordable manner" with a request for consideration pursuant to the Act. *Allen*, 393 U.S. at 571.

The main obstacle to the government's early efforts to enforce the fifteenth amendment was the conduct of state officials who resorted to the "extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees." Thus, Congress sought to create a stringent mechanism to address all potentially discriminatory enactments, even those in unanticipated forms whose impact on the political process nevertheless could be significant. *White*, 439 U.S. at 47.

Section 5 was one of the "array of potent weapons" Congress mobilized against the "insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution." *Katzenbach*, 383 U.S. at 337, 309. Congress recognized that for over 100 years, government attempts to enforce the fifteenth amendment's protections against race-based voting discrimination through case-by-case litigation

had been unsuccessful. *Id.*, at 313; *White*, 439 U.S. at 37.

Congress set up an enforcement scheme whereby all new voting practices in covered jurisdictions would be suspended until the jurisdiction obtained either a declaratory judgment from the District of Columbia District Court or a failure to object by the Department of Justice indicating that the new voting procedures had neither the purpose nor the effect of racial discrimination. *Katzenbach*, 383 U.S. at 317. By suspending all new voting changes before implementation, Congress "shift[ed] the advantage of time and inertia from the perpetrators of the evil to its victims." *Id.*, at 327; See footnote 2, *supra*. This "uncommon exercise of Congressional power" was justified by the exceptional conditions found in the covered jurisdictions. *Id.*, at 334.

From this history, it is clear that §5's enforcement mechanism is an intricate and carefully balanced scheme that cannot function without rigorous voluntary compliance from the states. Just last term, this Court reaffirmed this bedrock concept, rejecting a lower court decision that

sought to diminish covered jurisdictions' compliance responsibilities while creating "incentives for them to forgo the submission process altogether." *Clark v. Roemer*, 59 U.S.L.W. 4583, 4586. The rule created by the district court embraces the narrow vision of §5 that was rejected last term in *Clark*.

A local district court⁶ faced with a challenge to a jurisdiction's failure to preclear a voting change under §5 is forbidden from making any determination as to the discriminatory purpose or effect of that change. The sole inquiry before the local court is "whether a particular state enactment is subject to the provisions of the Voting Rights Act, and therefore must be submitted for approval before enforcement." *Allen*, 393 U.S. at 561. The three-judge district court in this case articulated the proper standard, noting that its inquiry was limited to the coverage issue, *Ed Peter Mack, Nathaniel Gosha, III, and Lawrence C. Presley, individually and on behalf of others similarly situated v. Russell County Commission and Etowah County Commission*, No.

⁶The statute authorizes the convening of three-judge courts to hear such claims. 42 U.S.C. §1973b.

89-T-459-E, slip op. (M.D. Ala., August 1, 1990), A-8⁷. However, it failed to apply this standard when it held that the changes at issue, though arguably changes that affected voting, were beyond the reach of §5.⁸ A-16, A-19.

The court below created a novel exception to the statutory scheme, claiming that either no discrimination would result from the changes in question or that any such discrimination would be *de minimis*. A-17 n.15, A-19. This "*de minimis* exception" to §5 completely disregards the statute's express mandate that all voting changes in covered jurisdictions be precleared, 42 U.S.C. 1973c, and threatens to undermine the voluntary compliance mechanism of the Act's enforcement scheme in two critical ways. First, a *de minimis* exception would allow local district courts to intrude upon the exclusive authority of the District of Columbia District Court and the Attorney General to make

⁷The unpublished opinion in these cases appears in the appellants' Appendices to the Jurisdictional Statements. Citations to this opinion throughout will refer to the Appendix to the Jurisdiction Statement in *Presley v. Etowah County*, No. 90-711.

⁸Of the three changes originally challenged by appellants, the district court found that the shift in administrative authority of the Etowah County Road Commission -- which stripped administrative control for the road district from the seat won by the African American directly following his election -- was covered by §5. A-20.

substantive determinations regarding discrimination under §5. Second, as a practical matter, the inevitable effect of this categorical exception will be to throw open to covered jurisdictions the determination as to which voting changes should be submitted for §5 review.

This Court has held §5's preclearance requirements to be "all inclusive of any kind of practice," covering state enactments that alter the election law of a covered state in even a minor way. *Allen*, 393 U.S. at 566. Whether subtle or obvious, changes that affect voting are within the statute's reach. *Id.*, at 565. Under §5, no covered jurisdiction may enforce a change affecting voting without obtaining prior approval. *White*, 439 U.S. 32. See *United States v. Sheffield Board of Commissioners*, 435 U.S. 110 (1978); *Perkins v. Matthews*, 400 U.S. 379 (1971); *McDaniel v. Sanchez*, 452 U.S. 130 (1981).

The Court has recognized that §5 reaches all changes that have potential impact on the political system. Thus, candidate filing periods, *NAACP v. Hampton County Election Comm.*, 470 U.S. 166 (1985); personnel policy changes affecting candidates' ability to run for office, *White*,

439 U.S. 32; bulletins from a state election board outlining methods of casting absentee ballots, *Allen, supra*; and the rescheduling of candidate qualifying periods, *Hadnott v. Amos*, 394 U.S. 358 (1969) have all been found to require preclearance. See also, *Huffman v. Bullock County*, 528 F. Supp. 703 (M.D. Ala. 1981)(changes in office administration policies that shift the burden of paying support staff salaries to elected official are subject to §5 because such changes increase financial burdens on elected official and discourage African Americans from seeking office).

In *White*, the change at issue was a rule requiring school board employees to take unpaid leaves of absence when running for political office. The Dougherty County Board argued that the rule was a mere personnel policy aimed at guarding against absenteeism among its employees. 439 U.S. at 40. Noting that the policy only affected political candidates and not other potential absentees, this Court held that the change was an "obstacle to candidate qualification" and thus was a covered change within the language of §5. *Id.*, at 43.

The disputed change in *NAACP v. Hampton County Election Commission, supra*, was a modification in the date of election and the candidate filing period. The State of South Carolina contended that the change, made in an attempt to respond to an objection to an earlier voting change by the Department of Justice, was merely a ministerial action taken to comply with the Department's requirements. 470 U.S. at 174. This Court observed that the filing period could not be viewed in isolation from the election of which it was a part. It held that the prolonged filing period created by South Carolina had the "potential to hinder voter participation," as did the change in the election date to no longer coincide with the general election. It ruled that both changes were covered under the Act. *Id.*, at 178.

The district court erred in creating a *de minimis* exception to §5 coverage. As explained below, Congress did not intend to create any exceptions to the Act.

1. Congress Repeatedly Has Explicitly Rejected Attempts to Create *De Minimis* Exceptions to §5's Coverage.

In order fully to effectuate the enforcement mechanism of the statute, this Court has interpreted §5, from its inception, so as to afford it "the broadest possible scope". *Allen*, 393 U.S. at 576. *NAACP v. Hampton County Election Commission*, 470 U.S. at 176; *Georgia v. United States*, 411 U.S. 526, 533 (1973); *White*, 439 U.S. at 46. If Congress had disagreed with this Court's broad interpretation of §5, lawmakers were free, when they renewed the Act in 1970, 1975 and 1982, to amend the statute in accordance with a more limited purpose. Instead, each time §5 has come up for renewal, it has been reenacted without substantive limitations. By these actions, Congress has made clear its continuing commitment to subject "all changes, regardless of how small," to §5 scrutiny. *Allen*, at 568.

Far from authorizing any exemptions from §5's coverage, Congress repeatedly has expressly *rejected* proposals to exclude even minor voting changes from the reach of the Act. For example, during the debate over passage of the 1965 Act, the suggestion was made that

certain types of minor changes, such as changing from paper ballots to voting machines, could be exempt from preclearance without undermining the remedial purposes of the Act. *Allen*, 393 U.S. at 568. However, the Attorney General warned that "precious few" exceptions would be allowed under §5 because "an awful lot of things . . . could be started for the purposes of evading the 15th amendment if there is the desire to do so." Ultimately, Congress chose not to exempt even minor changes from the reach of the Act. *Id.*; *Perkins v. Matthews*, 400 U.S. 379, 387 (1971).

Similarly, during the 1981 Voting Rights Act extension hearings before the House of Representatives, limits were proposed on the categories of changes subject to Section 5. The rationale offered was that requiring preclearance of trivial changes was a burden to the covered jurisdictions and to the Justice Department. Proponents of the limits also argued that Section 5 had been read in such unpredictably broad ways that jurisdictions could no longer discern its boundaries. By amending the statute so as to enumerate the categories of changes requiring preclearance, these proponents sought to limit the scope of Section 5.

Rejecting these proposals, the House Judiciary Committee wrote:

It has also been suggested that the types of electoral changes subject to preclearance review should be limited. For example, only those changes which have produced the most objections from the Justice Department. While some changes may adversely affect a greater number of people, others may have precisely the type of discriminatory impact which Congress sought to prevent, even though the numbers involved are smaller. . . . The lesson which both Congress and the courts learned from the pre-1965 litigation experience is that jurisdictions did not limit their efforts to discriminate to one type of voting practice. 'The discriminatory potential in seemingly innocent or insignificant changes can only be determined after the specific facts of the change are analyzed in context. The current formula allows for such factual analysis.'

1981 HOUSE REPORT 34-35 (quoting and paraphrasing the testimony of former Assistant United States Attorney General Drew Days, 1981 HOUSE HEARINGS 2122). Responding to similar arguments, in 1982 the Senate also rejected attempts to limit the scope of §5. Instead, it reaffirmed its commitment to apply §5 to *all* changes and went even further to enact penalties for local jurisdictions who failed to submit even arguably *de minimis* changes for §5 review. 42 U.S.C. §1973b.⁹ Thus, Congress declined to

⁹This section provides that a jurisdiction may bail out of §5 coverage if the United States District Court for the District of Columbia determines that during the ten years prior to the filing of an action for declaratory judgment, and during the pendency of the action, "such state or political subdivision and all governmental units within its territory have complied with Section 5 of this Act, including the requirement that *no change covered by section 5 has been enforced without preclearance under section 5. . .*')(emphasis

limit the range of changes subject to §5 preclearance, properly leaving the emphasis of §5 enforcement on whether the jurisdiction, and not the change, is covered. *See Days and Guinier, Enforcement of Section 5 of the Voting Rights Act*, in *MINORITY VOTE DILUTION* 173 (C. Davidson, ed. 1984)(hereafter cited as "Days and Guinier").

2. *A De Minimis Exception to §5 Coverage Would Render The Self-Reporting Requirement of the Act Ineffective*

Section 5's enforcement mechanism depends on a clear division of labor between the federal government and the covered jurisdictions. The covered jurisdiction is required to submit all voting changes for preclearance and the Attorney General must review those submissions to determine if there is a discriminatory impact. Congress has determined that this scheme of comprehensive reporting is the most effective way to implement its enforcement goals. *Clark v. Roemer*, 59 U.S.L.W. at 4586; *McDaniel v. Sanchez*, 452 U.S. 130, 151 (1981)("The prophylactic purposes of the §5 remedy are achieved by automatically requiring review of *all* voting changes prior to implementation by the covered

added); *See also*, S. Rep. No. 417, 97th Cong., 2d Sess. (1982) at 48 (noting that "if bail-out were not made dependent on record of timely submissions, there would be no incentive for jurisdictions to take seriously that requirement."

jurisdictions.")(internal quotation marks omitted); *McCain v. Lybrand*, 465 U.S. 236, 248 (1984), ("Enforcement of the Act depends upon voluntary and timely submission of changes subject to preclearance.") This determination was made in view of the Attorney General's limited resources and Congress's anticipation that the Attorney General would be unable to discover independently all changes with respect to voting enacted by covered jurisdictions¹⁰.

In order to effectuate Congress's enforcement scheme, the Attorney General has enacted regulations governing the implementation of the Act. The breadth of these regulations makes clear that there are no exceptions to §5 coverage:

28 C.F.R. §51.12 Scope of requirement

Any change affecting voting, even though it appears minor or indirect, returns to a prior practice or procedure, ostensibly expands voting rights, or is designed to remove the elements that caused objection by the Attorney General to a prior submitted change, must meet the section 5 preclearance requirement

¹⁰See *Days and Guinier* at 168 (Even during periods of rigorous enforcement, Department of Justice was unable to ensure that all voting changes were submitted because of lack of adequate resources to canvass changes, obtain compliance with preclearance procedures or ascertain whether submitting jurisdictions had complied with objections).

As the official charged with primary responsibility for enforcement of the Act, the Attorney General's interpretation of the Act is entitled to considerable deference. See e.g., *Sheffield Board of Comm'rs*, 435 US at 131, (deference should be accorded to Attorney General's construction of the Act, especially in light of the extensive role played by the Attorney General in drafting the statute and explaining its operation to Congress); *White*, 439 U.S. at 39, 58 L.Ed 2d 289, 99 S.Ct. 368.

The all-inclusive preclearance rule of §5 is based in part on Congress's and the Attorney General's recognition of a long history of noncompliance among the covered jurisdictions. The 1982 Senate Report observed that

The extent of non-submission documented in both the House hearings and those of this Committee remains surprising and deeply disturbing. There are numerous instances in which jurisdictions failed to submit changes before implementing them and submitted them only, if at all, many years after, when sued or threatened with suit.

. . . .

Put simply, such jurisdictions have flouted the law and hindered the protection of minority rights in voting.

S. Rep. No. 417, 97th Cong., 2d Sess. at 47-48. *See also*, NAACP, 470 U.S. at 175, n. 19. (The "prevalence of changes that were implemented without preclearance" as a "prime concern of Congress when it extended the Voting Rights Act in 1982.") This Court has recognized that noncompliance among the covered jurisdictions poses a serious threat to §5 enforcement. *Perkins*, 400 U.S. at 389¹¹. A *de minimis* exception to §5 coverage would exacerbate that threat by further weakening compliance by the covered jurisdictions. This is because the practical effect of a *de minimis* exception that allows courts to decide that certain changes are inconsequential under §5, is to expand the discretion of covered jurisdictions to decide that certain changes are not within the Act and need not be submitted.¹² A *de minimis* exception thus would "permit[] circumvention

¹¹ In *Perkins* this Court observed:

The history of white domination in the South has been one of adaptiveness, and the passage of the Voting Rights Act and the increased black registration that followed has resulted in new methods to maintain white control of the political process. 400 U.S. at 388.

¹² Jurisdictions under preclearance are subjected to the rigorous requirements of the Act precisely because of a documented history of egregious abuses of voting rights and abuse of discretion. *See Katzenbach, supra; Allen, supra.*

of the requirement that itself was designed to eliminate circumvention of the goals of the Act." *McCain v. Lybrand*, 465 U.S. at 249.

- B. Even if there were a *de minimis* exception, fundamental changes in the authority of an elected official potentially dilute minority votes and are not *de minimis* changes.

The enactments at issue in this case stripped a newly elected African American official of the authority he was elected to exercise. As a result, the votes of minority voters who elected these officials were rendered virtually meaningless. The court below, however, held that the fundamental diminution of the duties of the African American voters' representative had "no obvious relation to voting rights,"¹³ and was not subject to §5.

In announcing this rule, the district court made two errors. First, it went beyond the issue of §5 coverage to examine the merits of the change. As discussed in Point I of the appellants' brief, the court below overstepped its jurisdiction. The consideration of substantive issues of

¹³The basis of the district court's conclusion was that no change had occurred in the constituencies of the officials among whom authority was reallocated. This issue is discussed in Point II *infra*.

discrimination properly is left to the District Court of the District of Columbia or the Attorney General.

Second, the court below misapplied the "potential for discrimination" standard for §5 coverage by disregarding the potential the disputed changes had to diminish African American voters' opportunity to cast a meaningful vote. Under the proper inquiry, which seeks to determine whether, under any circumstances, the changes at issue had the potential for discrimination, the disputed changes are covered by §5.

The purpose and structure of §5 demonstrate that Congress intended the Act to cover changes in the authority of elective office that have the potential to dilute minority voting strength.¹⁴ Congress explicitly condemned attempts to diminish African American voting strength by fundamentally altering elective offices. These attempts

¹⁴Congress enacted §5 as a "mechanism for coping with all potentially discriminatory mechanisms whose source and forms it could not anticipate, but whose impact on the electoral process would be significant." *White*, 439 U.S. at 47. As such, the Act's purpose has always been to prevent implementation of ever more sophisticated methods of obstructing African American voting rights. S.Rep. No. 417, 97th Cong., 2d Sess. (1982). Section 5 covers changes that affect the "power of the citizen's vote" as well as those that "undermine the effectiveness of voters." *Allen*, 393 U.S. at 569.

include: 1) extending the terms of offices held by white incumbents to avoid challenges by African Americans; 2) abolishing offices sought by African American candidates¹⁵; and 3) making local elective offices appointive in predominantly black counties but not in predominantly white counties. See 116 Cong. Rec. 6357 (daily ed. March 6, 1970)(Remarks of Sen. Bayh). Aware that local officials were employing these obstructionist tactics to dilute minority voting strength, Congress acted promptly in 1970 and again in 1975 to renew the Act.¹⁶ In 1982, Congress

¹⁵ Within a few days after an African American candidate qualified to run for justice of the peace to fill a vacancy in his district, county commissioners in Baker County, Georgia, voted to consolidate all militia districts into one district. "The effect was to abolish the one office for which a Negro had filed." 116 Cong. Rec. 6357 (daily ed. March 6, 1970)(Remarks of Sen. Bayh).

¹⁶Since the Act's inception, lawmakers repeatedly have expressed their intention that its provisions protect against attempts to diminish minority voting strength. See, e.g., 111 Cong. Rec. 8363 (daily ed. April 23, 1965) (statement of Sen. Javits)("The right to vote is the cornerstone of our democratic society. A citizen's respect for law rests heavily on the belief that his voice is heard, directly or indirectly in the creation of law.") *Id.*, at 38493 (Remarks of Rep. Ryan)(Work needs to be done to enable black citizens to share political power in communities where they are not an absolute majority); 121 Cong. Rec. 24111 (daily ed. July 22, 1975)(Remarks of Sen. Tunney)("I don't think that there is anything more fundamental to our political process than the right to vote. I would couple the right to vote in order of importance with the right of free speech and the right to make one's views known. But it does not do any good to the right to make your views known if you do not have

again renewed §5's protections precisely because it recognized that the potential for discrimination persists in changed voting practices despite the increasing number of African American elected officials.¹⁷

This Court has affirmed this clear congressional intent. In *Bunton v. Patterson*, a companion case to *Allen v. State Bd. of Elections*, *supra*, it held that changes that

the power to do anything about it, or if you do not have the ability to elect those officials who are going to govern your life. . . . The Voting Rights Act is, if nothing else, . . . an invitation to all Americans to participate in the process of government. . .).

¹⁷The potential for discrimination inheres in changes in the authority of elected officials because such changes affect the officials' ability to carry out the instrumental functions of government that they were elected to perform. When minority representatives' ability to carry out their functions is inhibited, the ballots cast in their support are diminished and the voters are powerless to address the effects of continued exclusion from government. The House Report that accompanied the 1982 amendments to the Act specifically addressed lawmakers's intention that §5 protect minority voters against continued exclusion from government. The report noted that:

The observable consequences of exclusion from government to the minority communities in the covered jurisdictions has been (1) fewer services from government agencies, (2) failure to secure a share of local government employment, (3) disproportionate allocation of funds, location and type of capital projects, (4) lack of equal access to health and safety related services, as well as sports and recreational facilities, (5) less than equal benefit from the use of funds for cultural facilities, and (6) location of undesirable facilities, e.g., garbage dumps or dog pounds, in minority areas.

H. Rep. No. 227, 97th Cong., 1st Sess. 14 (1981).

fundamentally alter the authority of elected African American representatives have the potential to dilute African American voting strength and thus are covered by §5. In *Bunton v. Patterson*, the Mississippi legislature abolished an elected county office, converting it to an appointed position. This Court held that the change potentially diluted African American voting strength because citizens could no longer elect a county official who was subject to voters' approval. 393 U.S. at 570. It therefore held that the change was covered by §5.

The *Allen* court recognized that §5 covers certain changes in the authority of elective offices that have an impact on minority voting strength. It cited as an example of such a change the incident described in Congressional testimony by Attorney General Katzenbach. Attorney General Katzenbach described the case of a school board that was ordered by a federal court to comply with the 1957 Voting Rights Act, but was then immediately stripped of all authority and funding to achieve compliance by the state legislature. See *id.*, at 568 (citing testimony of Attorney General Katzenbach). Similarly, courts have held that §5

covers manipulations that bar participation by minority voters' representatives. *See Hardy v. Wallace*, 603 F. Supp. 174 (N.D. Ala. 1985)(Following election of first African American legislative delegation for county, authority to appoint head of county racing commission transferred from local delegation to governor).

Indeed, if a legislature passed a kind of "grandfather clause"¹⁸ that barred from participation in legislative debate any legislator who had not been in office before the election of the first African American legislator, such a change would be covered by §5. *Cf. Hardy v. Wallace*, 603 F. Supp. 174. Likewise, if a state legislature fearing an African American opponent in a local government election extended the white incumbent's term of office by several years, the change would be covered. *See* 116 Cong. Rec. 6357 (Daily ed. March 6, 1970)(comments of Sen. Bayh).

The foregoing changes render African American votes for representatives of their choice meaningless because the changes subvert the representatives' authority to carry out

¹⁸ *See Guinn v. United States*, 238 U.S. 347 (1914).

the mandates they were elected to discharge. Such changes are the functional equivalents of "white primaries" which were used historically to obstruct African American voting rights. After white primaries were instituted, although African Americans still had the formal right to vote, their exclusion from critically important election contests rendered their votes meaningless. This Court long ago established that such an abridgement of African American voting rights is illegal. *Smith v. Allwright*, 321 U.S. 649 (1944), *Terry v. Adams*, 345 U.S. 461 (1953).

The decision of the lower court clearly conflicts with this Court's direction. Although the court lacked jurisdiction to decide the actual discriminatory effect of the disputed changes, it was obliged to determine whether those changes had any conceivable potential to dilute African American voting strength. It erred in this analysis. In Russell County, the court below held that because the official responsible for road operations both before and after the disputed change was elected by, or responsible to, the voters of the entire county, there was "no significant change in the influence wielded by the voters of any

district." A-17. This analysis fails to recognize that the voters' right to cast a meaningful ballot was potentially diminished because they no longer directly elected the official in charge of road operations. Had the change, from election to appointment, in the method of selecting the county engineer from election to appointment not occurred in Russell County, voters would have been able to elect an official responsible for road operations who was directly accountable to them. As a result of the changes occurring, even after African Americans obtained the ability to elect a road commissioner, this ability became meaningless because the commissioner had been stripped of his authority. Had the change not occurred, voters could have:

- 1) held the elected officials directly accountable for unpopular policy choices by voting for his/her opponent in the residency district--the county engineer is insulated from such direct responsibility to the voters; 2) had greater access to the road commissioner within their residency district and been able to lobby him/her to use his/her exclusive budgetary authority within the district to support policy choices--now all budgetary decision making and allocations

are centralized; 3) had direct input into the selection of the official responsible for road and bridge operations in the county--now they have indirect input, if any input at all, into the selection of the county road official.

The court below also held that the adoption of the Common Fund Resolution would have a negligible effect on minority voting strength because it did not change the allocation of overall budget authority to the commission as a whole. However, like voters in Russell County, voters in Etowah County potentially had their voting strength significantly diminished with the restructuring of the commission's budgetary authority. After the change: 1) voters could no longer elect from their residency district an official who had complete discretion over road and bridge funds in the district; 2) even if they convinced their representative to support a particular project, the commission as a whole could exercise veto power over the individual commissioner's choice; and 3) voters elected officials who had diminished bargaining power because they no longer had the ability to set district priorities individually

and "horse-trade" with other commissioners for their preferred projects.

II. The District Court Erred in Holding That Reallocations of Power Among Elected Officials Must Involve Changes in Constituency in Order to Come Within §5's Coverage.

The court below created a second impermissible exception to §5 coverage when it held that reallocations of authority among elected officials would only be subject to §5 scrutiny if they "effect a significant relative change in the powers exercised by governmental officials elected by, or responsible to, substantially different constituencies of voters."¹⁹ A-13-14. Section 5's scope does not rest on an analysis of the relative effect of voting changes among particular constituencies. The holding of the court below is wrong as a matter of law.

This Court has made only one express pronouncement about §5 coverage of reallocations of authority among elected officials. In *McCain v. Lybrand*, 465 U.S. 236

¹⁹The attempt of the court below to analyze the relative effects of the voting changes was another impermissible foray into the substantive discrimination issues that are reserved for the District of Columbia Circuit Court and the Department of Justice.

(1984), this Court noted that the "basic reallocation" of authority from the old county board to the new county council would be a covered voting change under the Act. Under the old county board system, the county was effectively governed by the local legislative delegation, with certain limited authority reserved to the county board. The old county board was comprised of three members, two of which were appointed by the local legislative delegation. The third member was elected at-large from the county. The new structure called for the at-large election of all members of the 5-member governing body.

Nothing in this Court's decision in *McCain* suggests that a change in the constituencies of the elected officials is a necessary prerequisite to §5 coverage. The Court's conclusion rests squarely on the fact that the restructuring caused fundamental changes in the function and powers of the governing board. 465 U.S. at 239 (1984) ("The Act created a new form of government for [the] County, altering the county's election practices."). In addition to the change in the function and powers¹ of the board, the Court noted three additional grounds for §5 coverage. None of the

Court's reasons even remotely relied on a change in constituency theory.²⁰

Moreover, none of the cases cited by the district court supports its rule that reallocations of authority among elected officials will only be subject to §5 if they involve a change in constituency. See *Horry County v. United States*, 449 F. Supp. 990 (D.D.C. 1978); *County Council of Sumter County v. United States*, 555 F. Supp. 694 (D.D.C. 1983)²¹; *Hardy v. Wallace*, 603 F. Supp. 174 (N.D. Ala. 1985)²² and

²⁰The Court suggested that the restructuring also could be covered under §5 because it: a) altered the office terms of the elected officials; b) altered the method of selecting certain officials from appointment to election; and c) created a residency requirement for county council members.

²¹In *Sumter County*, the district court rejected the theory -- virtually identical to the one advanced by the district court here -- that a restructuring of local government was beyond the scope of §5 because the constituencies of the old and new governing bodies did not change. The *Sumter County* court rejected this approach as "facile" because it ignored the *de jure* changes in the county's governing structure caused by the restructuring. Contrary to the interpretation of the district court in this case, the *Sumter County* court's holding did not rest on an analysis of the effect of the change on various constituencies. The *Sumter County* court based its holding on the simple fact that the "*de jure* scheme was unarguably altered . . . and constitutes a change cognizable under §5 of the Act." 555 F. Supp. at 702.

²²The *Hardy* court found §5 applicable to the changes in issue principally because the changes reversed the scheme of local voter oversight over a governing body that controlled over 63% of the total county revenue. The *Hardy* court noted that divesting the local legislative delegation of its authority to appoint the head of the body, and transferring the authority to the governor, had the potential to dilute African American voting strength. 603 F. Supp. at 179.

Robinson v. Alabama State Dept. of Educ., 652 F. Supp. 484 (M.D. Ala. 1987)²³. To the contrary, *Horry County*, the lead case relied on by the district court, explicitly held that a change in the duties of an elected official, without any change of constituency, was a change subject to §5. 449 F. Supp. at 995.²⁴ *Horry* was decided by a District of Columbia district court. Given the unique role played by that court in enforcing §5, its interpretation should be given great deference. *Katzenbach*, 383 U.S. 301; *Georgia v. United States*, 411 U.S. 156.

Changes that fundamentally alter the authority of an elective office have a *per se* impact on the electoral process and expressly come within §5's ambit. This rule is supported by the Attorney General's regulations for implementing §5. Those regulations expressly state that any changes in the "term of an elective office or an elected

²³While the *Robinson* court held that the change in the constituency that elected the two bodies was one basis for requiring preclearance, the court found that the change in the method of selecting the board was an independent ground for subjecting the plan to §5 scrutiny. 652 F.Supp. at 486.

²⁴The *Horry* court held that the new duties of the chair were "sufficiently different [to] constitute[] a change in electoral practice requiring preclearance under §5. *Id.*, at 995.

official or in the offices that are elective" are covered under the Act. 28 C.F.R. §51.13(i)

The changes at issue in this case are covered changes within the meaning of §51.13. The change that stripped the Russell county commissioners of their sole discretion to supervise the roads and bridges in their districts fundamentally changed the ways in which those officials exercised their authority and performed their administrative duties and unarguably was a "change in the offices that are elective. Likewise, the change in the fiscal autonomy of the Etowah county commissioners, and the decision to require that all road work be conducted through the existing four road shops, unarguably worked fundamental changes in the way the commission conducted business and thus was a "change in the office that is elective" as well. Whether within the language of the regulations or the statute itself, the changes at issue in this case are subject to §5.

Conclusion

For the reasons discussed herein, amicus respectfully urges this Court to reverse the holding of the trial court that the disputed changes are not covered by §5, and remand the cause to the district court for further proceedings.

Respectfully submitted,

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